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No. 437

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IN THE

Superior Court of Pennsylvania

PITTSBURGH DISTRICT

No. 125 April Term, 1956.

IN RE: APPEAL OF TRUSTEES OF THE CONGREGATION OF JEHOVAH'S WITNESSES, BETHEL UNIT, FROM THE DECISION OF THE BOARD OF ADJUSTMENT OF THE BOROUGH OF BETHEL, ALLEGHENY COUNTY, PENNSYLVANIA.

APPEAL OF PRENTISS P. SWIFT, J. A. BECK AND RAYMOND COMODOR, TRUSTEES OF THE CONGREGATION OF JEHOVAH'S WITNESSES, BETHEL UNIT.

RECORD

APPEAL FROM THE ORDER OF THE COUNTY COURT OF THE COUNTY OF ALLEGHENY AT No. A876 OF 1955.

MICHAEL HAHALYAK,
403 Commonwealth Building,
Pittsburgh 22, Pennsylvania,

HAYDEN C. COVINGTON,
124 Columbia Heights,
Brooklyn 1, New York,

Attorneys for Appellants.

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RECORD

IN THE COUNTY COURT
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: APPEAL OF TRUSTEES OF THE CONGREGATION OF JEHOVAH'S WITNESSES, BETHEL UNIT

No. A 876 of 1955

From

BOARD OF ADJUSTMENT OF THE BORO. OF BETHEL, ALLEG. CO., PENNA.

RELEVANT DOCKET ENTRIES

June 17, 1955, petition and affidavit filed. Petition presented in open court and appeal is allowed as prayed for whereas a writ of certiorari is hereby directed to be issued to Board of Adjustment of the Borough of Bethel commanding it to certify to this court under certificate of its chairman, its entire record in the matter in which this appeal has been taken. Returnable June 28, 1955. (By the Court).

Eo die, June 17, 1955, on motion of Michael Hahalyak, counsel for petitioner, the transfer of the within case from the Common Pleas Court of Allegheny County to the County Court, be and is hereby approved. (McBride, J.)

June 24, 1955, on order of court, writ of certiorari is hereby directed to the Board of Adjustment com-

manding it within 20 days after service by the Prothonotary of this court to certify to this court its entire record, Prothonotary to serve Board of Adjustment of Boro. of Bethel by reg. mail. Copy of writ and appeal petition writ to be returnable sec. leg. sec. reg. (By the Court) (Brown, J.).

Eo die, writ exit.

July 8, 1955, answer to petition filed and copy served. July 11, 1955, return of Board of Adjustment of Boro. of Bethel received and filed.

Sept. 12, 1955, on order of court, the date of hearing is fixed for October 3, 1955. (Brown, J.)

Oct. 4, 1955, on trial list. (Brown, J.)

Oct. 3, 1955, on petition and on order of court, Howard F. Brenholts is permitted to intervene as party appellee. (Brown, J.)

Oct. 13, 1955, transcript of proceedings received and filed.

Dec. 5, 1955, after hearing, the board's decision is hereby affirmed and appeal dismissed. Appellant pay costs. (Brown, J.)

Eo die, exception noted, bill sealed. (Brown, J.)

Eo die, opinion filed.

Dec. 15, 1955, appellant's exceptions filed. Copy mailed. Returnable January 20, 1956. January 20, 1956, on argument list. (Brown, J.)

March 1, 1956, after argument, the exceptions to the court's refusal of findings of fact and conclusion of law will be dismissed. Appellant pay the costs. (Brown, J.)

Eo die, exception noted. (Brown, J.)

Eo die Supplemental opinion filed.

Mar. 21, 1956, certiorari of Superior Court filed showing an appeal ex parte plaintiff filed at No. 125

April Term, 1956. Returnable 2nd Monday of November, 1956.

PETITION FOR APPEAL

To the Honorable, the Judges of Said Court:

Petitioners, Prentiss P. Swift, J. A. Beck, and Raymond Comodor, trustees of the Bethel Unit of Jehovah's Witnesses, respectfully represent:

1. Petitioners are the trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, located in the Borough of Bethel, Allegheny County, Pennsylvania. Petitioners hold in trust certain unimproved property known as Lot No. 9 and part of Lot No. 10 situate in the Oakhurst Plan of Lots fronting on Bethel Church Road, Bethel Borough, Allegheny County, Pennsylvania, said property being more fully described in deed recorded in the Office of the Recorder of Deeds of Allegheny County, Pennsylvania, in Deed Book Volume 3335 page 515. The said deed is incorporated herein by reference thereto.

2. On or about November 3, 1954, petitioners had a hearing before the Board of Adjustment of the Borough of Bethel from the refusal of the Secretary of the Borough of Bethel, the Borough Council of the Borough of Bethel and the Planning Commission of the Borough of Bethel, to grant or to authorize the granting of a building permit for the construction of a church on the above described property as provided for under the provisions of the Zoning Ordinance of the Borough of Bethel known as Borough Ordinance No. 70-11-51 as amended. At the said hearing petitioners requested a vari-

ance from the provisions of Art. III, Sec. 3 (9) of the Ordinance, requiring a church, etc., to be at least one fourth of a mile apart from another public building. The transcript of the said hearing and all exhibits thereto are made a part hereof by reference thereto.

3. On May 18, 1954, the Board entered an order dismissing the appeal referred to and refusing petitioners' request for a variance from the Zoning Ordinance. A dissenting opinion was filed by one of the members of the Board of Adjustment. The opinions are made a part hereof by reference thereto. Petitioners did not receive notice of said order until May 24, 1955.

4. Petitioners aver that the order of the Board of Adjustment was made in bad faith and contrary to the recommendations of the Planning Commission of the Borough of Bethel. The said decision or order is arbitrary, capricious, constitutes an abuse of discretion, is not in accordance with the law and is illegal by reason of its unconstitutional application. Petitioners aver that behind the said decision lies a pool of prejudice and discrimination.

5. Petitioners now appeal to this honorable Court under the provisions of the Act of 1927, May 4, P.L. 519, as amended, for relief against the unjust and arbitrary order and refusal of the Board of Adjustment to grant petitioners the requested variance.

6. The proposed church complies with all of the provisions of the Zoning Ordinance of the Borough of Bethel except Art. III, Sec. 3 (9) which provides that there shall be "no church, school, auditorium, stadium or other place of assembly within one-quarter mile of each other." The proposed church

is approximately 230 feet short of the one-quarter mile distance from the nearest public building.

7. Article IX, Sec. IV (3) of the Zoning Ordinance provides that the Board shall have the power to authorize a variance where it "would not be contrary to the public interest" and "where, owing to special conditions, a literal enforcement would result in unnecessary hardship so that the spirit of the Ordinance shall be preserved and substantial justice done." Petitioners aver that the requested variance would be within the complete spirit and intendment of the Ordinance and that its refusal constitutes an unnecesary hardship upon petitioners.

8. The majority opinion of the Board basis [sic] its rejection of the variance upon the alleged fact that the proposed church would unduly affect the traffic problem in the Bethel area. Their position is that 40 more church goers in the Borough of Bethel, representing the present membership of the Jehovah's Witnesses, would make the traffic problem in the Borough of Bethel almost unbearable. This absurd conclusion was reached despite the fact that a duly licensed architect testified under oath that the church property itself would be sufficient to accommodate 38 automobiles in off street parking, or practically one car for each member, a situation that compares favorably with any other church or public body in the Bethel area or in any other urbanized and civilized area. Of the present membership of 40 individuals included are minors and their parents.

9. Petitioners further aver:

(a) That the Ordinance as applied to petitioners is unconstitutional under the 1st and 14th

amendments of the United States Constitution and under the Pennsylvania Constitution;

(b) That the Ordinance abridges petitioners' rights to freedom of assembly and freedom of worship and is contrary to the cherished due process and equal protection clauses of the United States Constitution;

(c) That the Ordinance as applied to petitioners does not bear a substantial relationship to the police powers, that is, to the health, safety, morals and general welfare of the community;

(d) That the Ordinance is not uniform in its application and is arbitrary, unreasonable and discriminatory;

(e) That the action of the Board of Adjustment in denying the application for a permit was arbitrary, capricious, an abuse of discretion and without basis in fact or law. A few months prior to petitioner's application the Borough of Bethel granted a building permit to a church of larger proportions but having an even more restricted area separation. Petitioners aver that the granting of this permit was highly proper in that it advanced religious worship in the community. However, petitioners aver that the denial of their application under more favorable circumstances, simply because petitioners adhere to the view of a minority religious group, is discriminatory and that such discrimination smacks of prejudice.

(f) The Ordinance as applied to petitioners is vague and indefinite and fails to set forth a proper and definite standard for its application.

10. Petitioners furthe aver that not all of the objectors at the hearing b..ow were testifying within

the spirit of the Ordinance but on the contrary were testifying from the standpoint of thwarting petitioners' church and by so doing acquiring the church property for purposes of profit and speculation. The real estate expert who testified for the objectors called a few days after the hearing with an offer to purchase the property for speculation and profit. The expert had previously testified that a church in a residential area reduces property value.

11. The proposed church would add to the surrounding property value and would not adversely affect the development of the neighborhood.

WHEREFORE, petitioners pray that this honorable Court forthwith issue a writ of certiorari directed to the Board of Adjustment of the Borough of Bethel commanding it within twenty days after service thereof to certify to this honorable Court under the certificate of its chairman its entire record in the matter on which this appeal has been taken and that the prothonotary serve the Board of Adjustment with a copy of a writ and of the appeal petition by registered mail as provided for under the law.

Petitioners further pray that the costs on this appeal be assessed against the majority members of the Board by reason of their bad faith and their abuse of discretion in this matter.

MICHAEL HAHALYAK
Attorney for Petitioners

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } SS:

Before me, the undersigned authority, personally appeared Prentiss P. Swift, J. A. Beck and Ray-

mond Comodor, who, being duly sworn according to law, depose and say that the averments contained in the foregoing Petition are true and correct to the best of their personal knowledge, information and belief.

RAYMOND COMODOR
J. A. BECK
PRENTISS P. SWIFT

Sworn to and subscribed before me
this 31th day of May, 1955.

MICHAEL ZSAK
Notary Public
MICHAEL ZSAK, Notary Public
Pittsburgh, Allegheny Co., Pa.
My Commission Expires
January 29, 1959

ORDER OF COURT

AND NOW, to wit, this 23rd day of June, 1955, it appearing to the Court that the Petition for Appeal filed in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 2983 July Term, 1955, was duly transferred to this Court by order of the Court of Common Pleas dated June 15, 1955, and that the said transfer was approved by this honorable Court by its order dated June 15, 1955, upon consideration of the within Petition, it appearing that the said Petition is in proper form, on motion of Michael Hahalyak, counsel for petitioners, it is hereby ordered and decreed:

(e) That a writ of certiorari be and is hereby directed to the Board of Adjustment of the Borough

of Bethel commanding it within twenty days after service by the Prothonotary of this Court to certify to this Court under the certificate of its chairman its entire record in the matter in which this appeal has been taken;

(b) That the Prothonotary of this Court shall serve the Board of Adjustment of the Borough of Bethel by registered mail with a copy of the writ and a copy of the appeal petition;

(c) That the Board of Adjustment shall file the entire record with the writ on or before tne return day of the writ;

(d) That this writ shall be returnable sec leg. sec reg.

BY THE COURT
BROWN, J.

ANSWER TO PETITION FOR APPEAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

AND NOW, to-wit, this 8th day of July, 1955, comes the Board of Adjustment of the Borough of Bethel, and by its attorneys, Cooper, Hunter & Lewis, makes the following answer to the Petition for Appeal filed by the Congregation of Jehovah's Witnesses, Bethel Unit.

1. The averments of paragraph One are neither admitted nor denied, respondents having no knowledge thereof, except such as is incorporated in the statement made by petitioners.

2. Admitted.

3. Admitted.

4. The averments of paragraph Four are scan-

dalous and defamatory, insofar as they charge impropriety in the action taken by the Board of Adjustment, and therefore, neither require nor merit any answer. The remaining allegations of the fourth paragraph are conclusions of law, and therefore require no answer.

5. The averments of paragraph Fifth are predicated upon an appeal improperly taken by petitioners to the Common Pleas Court of Allegheny County, and are neither admitted nor denied.

6. The averments of paragraph Six are denied as stated, respondents asserting that the proposed Church is approximately 440 feet short of the one-quarter mile requirement in the Zoning Act, and that in addition, the off-street parking requirements have not been shown to be in conformity with Article III, Section. 3, (8) of the Zoning Ordinance. In addition, the proposed Church violates the Zoning Ordinance of the Borough of Bethel by requesting a use which the Board has found to be a traffic hazard.

7. The averment of paragraph Seven, setting forth the authority of the Board is admitted, but the conclusion of the petitioners that the requested variance is "within the spirit and intendment of the Ordinance" is a statement of the petitioners opinion, which opinion is not shared by the Board of Adjustment.

8. The averments of paragraph Eight are largely impertinent and therefore do not merit any answer. Insofar as such paragraph alleges the membership of the proposed church, respondents have no knowledge thereof and is immaterial and demands strict proof thereof at the hearing herein.

9. The averments of paragraph Nine are largely

conclusions of law and therefore require no answer. Where the averments are not conclusions of law, they represent scandalous and impertinent attacks on the individual respondents, and therefore merit no answer.

10. The averments of paragraph Ten are immaterial and irrelevant and therefore require no answer. Respondents would like to point out, however, that the intemperate nature of the remarks appearing therein is in conformity with the general tenor of the Petition, which seeks to attribute to the majority members of the Board of Adjustment, and to the objectors who appeared to testify against the petitioners before said Board of Adjustment, impropriety in both motives and conduct, while at the same time arrogating to the petitioners the loftiest and most laudable principles.

11. The averments of paragraph Eleven are matters of opinion, and therefore do not require answer.

12. For further answer, respondents assert that the majority opinion of the Board of Adjustment is based upon the fact that the petitioners purchased the land for which they requested a variance, at a time when the Zoning Ordinance of the Borough of Bethel prohibited the erection of a church or public building thereon, which fact was a matter of public record; and that because of the traffic hazard involved, there being no hardship or special conditions warranting the grant of a variance, the refusal of the application of the petitioners for such variance was therefore fitting and proper in the circumstances.

WHEREFORE, respondents respectfully request

your Honorable Court to dismiss the appeal herein taken, at the cost of the petitioners.

COOPER, HUNTER & LEWIS
JOSEPH I. LEWIS
Attys for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } SS

Before me, the undersigned authority, personally appeared EDWARD J. PLOCKI, Chairman of the Board of Adjustment of the Borough of Bethel, who, being duly sworn according to law, deposes and says that the averments set forth in the foregoing Answer to Petition for Appeal are true and correct, to the best of his knowledge, information and belief.

EDWARD J. PLOCKI

Sworn to and subscribed
before me this 8th day
of July, 1955.

GRACE M. PELLO
GRACE M. PELLO, Notary Public
Pittsburgh, Alleghany County, Pa.
My Commission Expires
January 7, 1959

PETITION FOR INTERVENTION

1. Petitioner Howard F. Brenholts is a resident and taxpayer of the Borough of Bethel, Allegheny County, Pennsylvania.

2. Petitioner is the owner of land located in the Oakhurst Plan of Lots abutting upon the southeasterly side of the lot of land owned by Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, appellants in this case. Said land of appellants is described in paragraph one of the Petition for Appeal.

3. Petitioner desires to intervene in this action because petitioner could have joined as an original party.

4. An owner of property affected by a decision of the Board of Adjustment may himself take an appeal to this court under Section 3307 of the Act of May 4, 1927, P. L. 519, as added by Section 93 of the Act of July 10, 1947, P. L. 1621 (53 P. S. § 15211.7) which permits any taxpayer of a borough to be appellant in connection with decisions of a board of adjustment.

5. Petitioner possesses a legally enforceable interest which may be affected by the determination of the action in that petitioner is the owner of property located near to and abutting upon appellant's property directly involved in this case and, therefore, the use of appellant's property will affect petitioner's health, safety, and welfare.

6. If petitioner is allowed to intervene, petitioner will adopt as petitioner's answer the averments of the answer filed on behalf of the Board of Adjustment of Bethel Borough.

7. Petitioner's intervention will not delay, embarrass, or predjudice [sic] the adjudication of the case because petitioner does not request time to file an answer, and because petitioner does not request any continuance of the hearing date.

WHEREFORE, pursuant to Pa. R. C. P. No. 2327, petitioner requests that the court grant petitioner leave to intervene as a party appellee in this case.

DAVID W. CRAIG
MOOREHEAD & KNOX
Attorney for Petitioner

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } SS:

Howard F. Brenholts, petitioner in the foregoing petition, having been duly sworn, deposes and sa s that averments of the foregoing petition are true and correct to the best of his knowledge, information, and belief.

HOWARD F. BRENHOLTS

Sworn and subscribed to before me this 28th day of September, 1955.

J. M. McLAIN, Notary Public

ORDER OF COURT

AND NOW, this 4th day of Oct., 1955, upon petition for intervention, it is hereby ordered, adjudged,

and decreed that, pursuant to Pa. R.C.P. 2327, Howard F. Brenholts be permitted to intervene as a party appellee in this appeal by adopting the answer heretofore filed on behalf of the Board of Adjustment of the Borough of Bethel.

BY THE COURT
BROWN, J.

PRAECIPE FOR APPEARANCE

To: DAVID B. ROBERTS, CLERK:

Enter our appearances as attorneys for the Borough of Bethel, Allegheny County, Pa., in the above entitled matter.

COOPER, HUNTER & LEWIS
JOSEPH I. LEWIS
Attorneys for Borough of Bethel

October 4, 1955

TRANSCRIPT OF OFFICIAL NOTES OF PROCEEDINGS

Before: HON. HOMER S. BROWN (Non-Jury)
Pittsburgh, Pa.
October 4, 1955

Appearances:

MICHAEL HAHALYAK, Esq., for Appellant.
JOSEPH I. LEWIS, Esq., for Bethel Borough.
DAVID W. CRAIG, Esq., for Intervener.

RAYMOND COMODOR, a witness produced on behalf of the appellants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. HAHALYAK:

Q What is your name?

A Raymond Comodor.

Q Where do you live, Mr. Comodor?

A I live in Peters Township.

Q What is your religious affiliation?

A I am one of the Jehovah's Witnesses, an ordained minister of the Jehovah's Witnesses.

Q Where is your service located?

A Do you mean at the present time?

Q Yes.

A On Clifton-Library Road, our temporary headquarters.

Q Where?

A At the residence of J. A. Beck.

Q Where is that? In the Bethel Borough?

A Yes, that is in Bethel, in Bethel Borough.

Q Do you hold any office with the Jehovah Witnesses?

A I am Assistant Congregation Servant of the Bethel Congregation.

Q Are you a Trustee also?

A Yes, I am.

Q And you are one of the Trustees on this appeal taken by Jehovah's Witnesses, Bethel Unit, is that right?

A Yes, sir.

Q Have you examined other properties in the Borough of Bethel—

MR. CRAIG: If the Court please—

MR. HAHALYAK: Let me finish my question.

THE COURT: Let him complete his question.

MR. HAHALYAK:

Q You, as Trustee, have caused this appeal to be taken because of the—

MR. CRAIG: That is leading.

MR. HAHALYAK: Wait until I finish the question.

THE COURT: Wait until he finishes the entire question and if it appears to be leading or irrelevant, it can be stricken.

The Witness:

A Will you repeat the question?

(Upon request, the pending question that portion which is in the record so far, was read as follows:

"You, as Trustee, have caused this appeal to be taken because of the—"

MR. HAHALYAK:

Q —refusal of the Board of Adjustment to grant you a license to build the proposed church in Bethel, is that right?

A Yes, that is right. When you say licensed, you mean the variance?

Q The variance, the permit—

A The variance, the permit, yes.

Q In other words, they failed to grant the variation you requested, one of the reasons given by the Board of Adjustment is that this church which you propose to build would be within one-quarter mile of another public building or structure?

A That is why they prohibited its construction. That is right.

Q Could you tell the Court whether there were

other churches within a quarter of a mile of any other public building or of any other churches of the Borough of Bethel which had been constructed subsequent to the enactment of the ordinance forbidding the construction of a church within a quarter of a mile area?

MR. CRAIG: That question is objected to on the ground that it is cumulative of the record of the Board of Adjustment and, moreover, it is irrelevant and immaterial because the granting of permits to other churches cannot, in law and in fact, have any bearing on the use sought by the appellant here.

MR. LEWIS: For the Borough of Bethel, this question is objected to as incompetent and irrelevant and immaterial, and particularly, because it involves the introduction of issues collateral to the present proceeding. I would like to have the attorney for the appellant make an offer in order to determine whether or not the evidence to be introduced by this witness does have for its purpose the introduction of collateral issues involving the granting or refusal of permits in other sections of the borough.

MR. HAHALYAK: If your Honor please, in my Petition I aver discrimination. I intend to show other conditions existing near by and that by refusal of the present variance the Board has discriminated simply because the appellants happen to be of Jehovah Witness faith. In other words, discrimination is an important factor in this case and we propose to show that the Board acted with prejudice and discrimination. Secondly, the Ordinance itself provides that in issuing these exceptions of variations, the Board shall consider—and I am quoting directly from the Ordinance—whether such acts will tend

to affect adversely the use and development of neighboring property in the general neighborhood in accordance with the Zoning Ordinance."

MR. LEWIS: Specifically, what evidence?

MR. HAHALYAK: I state it is my position that we must look to the environment there, the surrounding properties, and determine the characteristics of that neighborhood, because if variances have been granted elsewhere it certainly affects the characteristics. It is a vital and important factor in this proceeding to determine whether or not this variance should have been granted. And, third, this evidence was considered relevant by the Board below, and because we did not have available the information we now have, we deem it necessary that the Court consider this point more fully; also, the rules of evidence in zoning proceedings which involves an understanding of the entire neighborhood in order to make a proper determination should not be as strict as in ordinary cases, the overall picture is necessary and the rules that ordinarily apply to evidence such as res inter alios acta are certainly not applicable here.

THE COURT: Now, this is not for the record.

(Argument off record.)

THE COURT: Insofar as the question of variance is now being raised, the Court takes the position that any evidence of other variances in the district is incompetent. Therefore, we sustain the objections interposed by Mr. Craig and Mr. Lewis and note you an exception.

(Exception noted.)

MR. HAHALYAK: I then have an exception, your Honor, and as I stated previously, my grounds for

the introduction of this evidence would have been to show the neighboring properties in general, the neighborhood, the characteristics of it, whether or not this would fall within it, and I say from that standpoint, this evidence should have been admitted.

MR. LEWIS: We have no evidence that may be relevant, or you may want to go further into the testimony that has already been given. That, of course, is discretionary with your Honor. Subject to that qualification, I feel at this time I have no further testimony to present.

(Discussion off record.)

THE COURT: Let the record show that counsel for the appellant and counsel for the appellee intervenor now on the record have no objection to the entering of the appearance and intervention on behalf of the Borough of Bethel without the filing of a formal petition for intervention.

(Further discussion off record.)

OPINION OF COUNTY COURT

(Reported: 103 Pittsburgh Legal Journal 489)

BROWN, J.

This is an appeal from the decision of the Board of Adjustment of the Borough of Bethel, refusing to grant to appellants a variance from the requirements of the zoning ordinance of the borough.

Briefs and requests for findings of fact have been filed by appellants and by the intervenor. Testimony taken by this Court was merely cumulative of what was presented before the Board of Adjustment. Accordingly, in making its findings of fact this Court will give due consideration to the findings

of the Board below, insofar as these findings are supported by the evidence before the Board.

The following facts are found by this Court:

1. Appellants are the trustees of the Bethel Unit of the Congregation of Jehovah's Witnesses, a religious sect desiring to build a church on Lot No. 9 and part of Lot No. 10 in the Oakhurst Plan of Lots in the Borough of Bethel.

2. The Borough zoning ordinance, Article III, sec. 3(8) requires that off-street parking space be provided at places of assembly, including churches, 300 square feet of parking area to be provided for every 5 seats, or fraction thereof, in the building.

3. The Borough zoning ordinance, Article III, sec. 3(9) forbids the location of places of assembly, including churches, within a quarter mile of each other.

4. The Borough zoning ordinance and the provisions thereof described in findings Nos. 2 and 3 were in effect at the time appellants purchased the land here involved.

5. Neither at the time of said purchase nor prior thereto did appellants examine the zoning ordinance or consult with the Borough officials about zoning regulations.

6. Appellants' land is located at the intersection of Bethel Church Road and Fort Couch Road, which intersection is heavily traveled on account of its convenient location with reference to access to State Highway Routes Nos. 88 and 19.

7. The flow of traffic through said intersection is complicated by the presence of three traffic islands in the intersection.

8. Appellants' plans show availability of 3900 square feet for off-street parking, which would pro-

vide parking for 13 cars under the provisions of the zoning ordinance.

9. The proposed Church building is intended to accommodate a potential membership of 85 persons.

10. The proposed location of the Church is 877 feet from the nearest place of assembly, the Bethel Presbyterian Church, located on Bethel Church Road.

11. The erection of appellants' Church at this intersection location would substantially increase traffic dangers and congestion.

12. Appellants' land is no different from other land in the area, and it presents no unique or unusual feature peculiar to it as distinguished from the other land in the area.

The grounds of appellants' appeal are, first, that the zoning regulations here involved are unconstitutional; and second, if not, that the Board of Adjustment abused its discretion in refusing to grant a variance.

In its opinion the Board of Adjustment, to sustain its decision, invoked only Article III, sec. 3(9) of the ordinance, which is the section requiring a quarter mile distance between places of assembly; and counsel for appellants in his brief limits his attack to that section. However, the intervenor in urging affirmance of the decision of the Board, puts forth as an additional ground in support thereof the fact that appellants have failed to show compliance with the off-street parking requirements of Article III, sec. 3(8).

In disposing of this appeal we will decide the question of the constitutionality of both sections, for the view taken as to each is the same, and the views to be expressed are applicable to both.

It is well at the outset to point out that churches and religious organizations are proper subjects for valid zoning regulations—that is, churches are not exempt from zoning regulations. Corp. of Presiding Bishop, etc. v. Porterville, 338 U. S. 895, 70 S. Ct. 78 (1949); Kurman v. Philadelphia Zoning Board of Adjustment, 351 Pa. 247; and O'Brien v. City of Chicago, 347 Ill. App. 45.

Zoning laws are enacted under the police power. To be valid a limitation on the use of property prescribed by a zoning ordinance must bear a reasonable relation to a legitimate police power purpose. The usual statement of the rule is that the zoning regulation must bear a rational relation to the public health, safety, morals or general welfare. Appeal of Lord, 368 Pa. 121; White's Appeal, 287 Pa. 259.

The sections of the zoning ordinance here being considered obviously are aimed at the reduction of traffic danger and congestion. There is no case in which the appellate courts of Pennsylvania have ruled that a zoning regulation may validly be based on such ground—that a zoning regulation enacted to reduce traffic danger and congestion is a proper exercise of the police power. However, the answer to the question whether a zoning regulation may be so based is implicit in the very statement of the question. Further, McSorley v. Fitzgerald, 359 Pa. 264, is authority to the effect that reduction of traffic danger and congestion is a proper object for exercise of the police power. Although that case was not a zoning case, what was said there about the police power is equally applicable in a zoning context:

> "And since the Act is concerned with the regulation of the transportation of persons and property along the highways of the municipality and since the evils it seeks to remedy vitally affect conditions for the transaction of business, the prevention of accidents, the effective operations of fire and police forces, and, in general, the enjoyment of many phases of city life and activities, its justification stems directly from the exercise of the police power, which is the supreme power of government. The right of eminent domain which it gives to the Authority must be viewed, therefore, not as though it were an independant and unrelated grant of such a right, but with regard to the major and primary object of the legislation, which is to facilitate and make safe the use of the highways."

Yokely, Zoning Law, 2d Ed., sec. 212, also asserts that the McSorley case holds that control of traffic congestion is a proper subject for police power regulation.

The Superior Court has recently affirmed, in an opinion filed November 16, 1955, in re. Appeal of Elmer P. Schaub, et al, at No. 105 April Term, 1955, the grant of a variance on the ground that traffic congestion would be greatly reduced and therefore the grant of a variance was in the public interest. If a variance from the terms of a zoning ordinance may be granted to relieve traffic congestion, then certainly a zoning ordinance itself may validly be designed to accomplish that same purpose.

Counsel for the appellants in his brief cites the statement made by this Court in Scherger v. Zoning

Board of Adjustment, 103 Pittsburgh Legal Journal 397, at p. 400, that ". . . traffic increase in itself is not a compelling factor to be considered in a zoning case . . ." Counsel uses such quotation in support of his argument to the effect that traffic congestion does not afford a valid basis for exercise of the police power against a religious group, to relieve it. However, the Scherger case and the statement quoted from the opinion in that case are entirely inapposite to the question involved in appellants' case. The Scherger case was one involving the denial of a special exception provided for by the zoning ordinance—that is, the board of adjustment had refused to permit a use which was expressly permitted by the zoning ordinance when granted as a special exception. In such case, if the board would deny the special exceptions, the burden of proof is upon the board to show that the proposed use of the property was detrimental to the public health, safety, morals or general welfare of the community (Borden Appeal, 365 Pa. 517). A showing of an increase in traffic without more, is not sufficient evidence to meet the burden of proof borne by the board of adjustment; and that is what was held in the Scherger case. The question in appellants' case is an entirely different one, namely, whether traffic danger and congestion afford a proper basis for exercise of the police power through zoning regulation to reduce such danger and congestion. The answer is in the affirmative.

While zoning regulations may therefore properly be grounded upon a purpose to reduce traffic danger and congestion, the particular measures or limitations provided must be reasonable, and must be

reasonably necessary to accomplish the intended good effect. White's Appeal, supra.

The measures under consideration here are a requirement of a quarter-mile distance between places of assembly, and a requirement that there be 300 square feet of off-street parking area provided for each 5 seats in the place of assembly.

No Pennsylvania case has been cited, and none has been found, in which substantially similar requirements have been examined and ruled upon. We cannot say, in this day of heavy and high-speed traffic on inadequate highways, that the judgment of the Borough Council as to the necessity and propriety of these requirements was unreasonable. Accordingly, we are left with the rule that the ordinance is presumed valid until the contrary is shown by the allegation of proof of facts that would establish unreasonableness. Liggett's Petition, 291 Pa. 109; W. Conshohocken v. Conshohocken Electric Light & Power Co., 29 Pa. Superior Ct. 7; and Bell Telephone Company's Appeal, 138 Pa. Superior Ct. 527.

If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Euclid v. Ambler Realty Co., 272 U. S. 365.

The second ground on which appellants' appeal is based is that the Board of Adjustment abused its discretion in refusing to grant appellants a variance.

The law is clear that a variance may properly be granted only where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impact of the

zoning regulations on the entire district. Nichaner Appeal 382 Pa. 401. The grant of a variance is to be limited to cases wherein, due to special conditions, denial will result in unnecessary hardship, which hardship is substantial and of compelling force. Bevereaux Foundation, Inc. Zoning Case, 351 Pa. 478; Valisenti's Appeal, 298 Pa. 276; and Kovacs v. Ross Twp. Board of Adjustment, 173 Pa. Superior Ct. 66.

The only hardship which appellants will suffer from the denial of their request for variance is that hardship which is intentionally ordained by the zoning ordinance—that is, their hardship is that which results from the impact of zoning upon the entire district, not from some peculiar circumstance inherent or attributable to appellants' lot alone. That appellants have spent considerable money to buy the land and to have plans for their proposed Church drawn is not the type of unnecessary hardship for which the law provides the variance remedy; especially is that so where, as here, the expenditures were made without first examining the zoning ordinance or consulting the Borough officials who could have warned appellants of the difficulty with which they would be faced. Moreover, the Board of Adjustment has found that appellants' land is not unique or unusual and is no different from the other land in the area, and the Board concluded that no special conditions exist which would warrant the grant of a variance.

Counsel for appellants in his brief asserts strongly that there is available no other tract of land suitable for church purposes. We do not say that this contention is borne out by the evidence, but if it were,

it would not be ground for requiring the grant of a variance. Catholic Cemeteries Association of the Diocese of Pittsburgh Zoning Case, 379 Pa. 516.

The question for this Court to decide is whether the Board of Adjustment in refusing the variance requested was guilty of a manifest and flagrant abuse of discretion. Catholic Cemeteries Assoc. Zoning Case, supra; Reininger Zoning Case, 362 Pa. 116. We cannot say that the Board was guilty of such error. On the basis of the testimony and evidence presented before the Board, the decision of the Board was not unwarranted.

CONCLUSIONS OF LAW

1. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(8) requiring off-street parking space at places of assembly is a constitutional exercise of the police power.

2. The Zoning ordinance of the Borough of Bethel, Article III, sec. 3(9) requiring a quarter of a mile separation between places of assembly is a constitutional exercise of the police power.

3. There are no special conditions relative to appellants' land here involved which would require the grant of a variance from the provisions of the Zoning Ordinance.

4. There is no unnecessary hardship to be sustained by appellants that would require the grant of a variance from the provisions of the Zoning Ordinance.

5. The Board of Adjustment in denying appellants' request for a variance did not abuse its discretion.

6. The decision of the Board of Adjustment refusing to grant the variance should be affirmed.

ORDER OF COURT

And Now, to-wit, this 5th day of December, 1955, for the reasons set forth in the foregoing Opinion the decision of the Board of Adjustment of the Borough of Bethel in refusing to grant the variance requested is affirmed, and the appeal hereby dismissed. Appellants to pay the costs.

Brown, J.

Eo die, exception noted to appellants, and bill sealed.

Brown, J.

EXCEPTIONS

Now, this 15th day of December, 1955, appellants except to the findings of fact, conclusions of law and order of court as follows:

1. Appellants except to the Court's finding of fact No. 2, which is as follows:

> "2. The Borough zoning ordinance, Article III, sec. 3(8) requires that off-street parking space be provided at places of assembly, including churches, 300 square feet of parking area to be provided for every 5 seats, or fraction thereof, in the building."

2. Appellants except to the Court's finding of fact No. 6, which is as follows:

> "6. Appellants' land is located at the intersection of Bethel Church Road and Fort Couch Road, which intersection is heavily traveled on account of its convenient location with reference to access to State Highway Routes Nos. 88 and 19."

3. Appellants except to the Court's finding of fact No. 7, which is as follows:

> "7. The flow of traffic through said intersection is complicated by the presence of three traffic islands in the intersection."

4. Appellants except to the Court's finding of fact No. 8, which is as follows:

> "8. Appellants' plans show availability of 3900 square feet for off-street parking, which would provide parking for 13 cars under the provisions of the zoning ordinance."

5. Appellants except to the Court's finding of fact No. 11, which is as follows:

> "11. The erection of appellants' Church at this intersection location would substantially increase traffic dangers and congestion."

6. Appellants except to the Court's finding of fact No. 12, which is as follows:

> "12. Appellants' land is no different from other land in the area, and it presents no unique or unusual feature peculiar to it as distinguished from the other land in the area."

7. Appellants except to the Court's conclusion of law No. 1, which is as follows:

> "1. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(8) requiring off-street parking space at places of assembly is a constitutional exercise of the police power."

8. Appellants except to the Court's conclusion of law No. 2, which is as follows:

> "2. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(9) requiring a quarter of a mile separation between places of assembly is a constitutional exercise of the police power."

9. Appellants except to the Court's conclusion of law No. 3, which is as follows:

> "3. There are no special conditions relative to appellants' land here involved which would require the grant of a variance from the provisions of the Zoning Ordinance."

10. Appellants except to the Court's conclusion of law No. 4, which is as follows:

> "4. There is no unnecessary hardship to be sustained by appellants that would require the grant of a variance from the provisions of the Zoning Ordinance."

11. Appellants except to the Court's conclusion of law No. 5, which is as follows:

> "5. The Board of Adjustment in denying appellants' request for a variance did not abuse its discretion."

12. Appellants except to the Court's conclusion of law No. 6, which is as follows:

> "6. The decision of the Board of Adjustment refusing to grant the variance should be affirmed."

13. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 3, which request is as follows:

> "3. The Bethel Unit of Jehovah's Witnesses do not at the present time have a church structure in the Borough of Bethel for conducting religious worship."

14. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 4, which request is as follows:

> "4. The Bethel Unit of Jehovah's Witnesses presently conduct their religious services in cramped basement quarters at the home of one of its members which is at an inconvenient location for the membership."

15. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 6, which request is as follows:

> "6. Pursuant to said purchase petitioners had a registered architect prepare plans for the construction of a church adapted to the property purchased, the drawing of which is in evidence, and filed the necessary plans and drawings of the proposed church with the Borough after having the minister of the congregation personally take the same to Harrisburg

and have the same approved by the Commonwealth of Pennsylvania pursuant to the requirements of the law."

16. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 7, which request is as follows:

> "7. The proposed church structure complies with all of the Zoning and Building regulations except Article III, Section 3(9) of the Zoning Ordinance."

17. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 9, which request is as follows:

> "9. According to the report of the Planning Commission the proposed church is approximately 230 feet short of the quarter mile limitation."

18. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 10, which request is as follows:

> "10. The Planning Commission recommended the granting of the permit."

19. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 13, which request is as follows:

> "13. The proposed church has a present membership of 40 persons and is built for a capacity membership of 85 persons."

20. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 15, which request is as follows:

"15. The proposed church would be used for services on Sunday at 3 p.m. to 4 p.m. and 7 p.m. to 8 p.m., Friday at 7:30 p.m. to 10 p.m. and on Tuesdays for one hour."

21. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 16, which request is as follows:

"16. During the period above specified an average of 25 to 28 persons would attend church and during the remainder of the week approximately 3 persons per day would be doing Bible research and study."

22. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 17, which request is as follows:

"17. Thirteen members of the Congregation have an automobile, the remainder would attend church by bus, streetcar or walking."

23. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 18, which request is as follows:

"18. According to the architect the church property would be able to accommodate 36 to 38 automobiles."

24. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 19 which request is as follows:

"19. The church property is adjoined on each side by vacant lots, in the rear by Crest Way which is a very lightly travelled public road and is situate in an area that is sparsely populated."

25. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 20, which request is as follows:

> "20. Traffic during the hours of use is not heavy."

26. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 21, which request is as follows:

> "21. The Bethel Church Road does not have a slow speed sign, nor a policeman directing traffic, nor a traffic light."

27. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 22, which request is as follows:

> "22. Protestants admitted that the traffic problem would be improved by a slow sign, the presence of a policeman and that 'it would be better to use these facilities to control traffic than to eliminate the existence of a church'."

28. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 23 which request is as follows:

> "23. The proposed church would not depreciate market values generally in the Borough of Bethel."

29. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 24, which request is as follows:

> "24. There are other churches constructed within a quarter mile of each other in the Borough of Bethel."

30. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 25, which request is as follows:

> "25. The proposed location was chosen after a committee investigated the entire Bethel area and found it to be the only site available for purchase which offered the uniqueness of an attractive central location with street car, bus, and automobile transportation facilities nearby."

31. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 26, which request is as follows:

> "26. The proposed church would be in the public interest."

32. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 27, which request is as follows:

> "27. The church meetings would be conducted in a very orderly manner without any noise."

33. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 28, which request is as follows:

> "28. The refusal of the variance would impose a hardship on appellants. Appellants have no other church in the area; they expended considerable time to locate this piece of property; it was the only piece open for sale which was suitable for the erection of a church and appellants have gone to considerable expense

in preparing plans and specifications suitable for the particular lot in question."

34. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 29 which request is as follows:

"29. Appellants purchased the proposed church property in reliance upon the general character of the neighborhood wherein other churches and other public buildings, etc., are built within a quarter mile of each other."

35. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 30, which request is as follows:

"30. Practically no other public place in the Borough of Bethel complies with the terms of the ordinance."

36. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 31, which request is as follows:

"31. The variance will not be contrary to the public interest and owing to special conditions a literal enforcement of the ordinance will result in unnecessary hardship so that the spirit of the ordinance shall be observed and substantial justice done."

37. Appellants except to the Court's refusal of the appellants' request for finding of fact No. 32, which request is as follows:

"32. The granting of the variance will not tend to affect adversely the use and development of neighboring properties and the gen-

eral neighborhood in accordance with the Zoning Ordinance."

38. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 1, which request is as follows:

"1. Section 3(9) of Article III of the Zoning Ordinance of the Borough of Bethel No. 70-11-51 is unconstitutional in that it fails to bear a substantial relation to the police powers."

39. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 2, which request is as follows:

"2. Section 3(9) of Article III of the Zoning Ordinance of the Borough of Bethel No. 70-11-51 is unconstitutional as applied to appellants in that it arbitrarily deprives appellants of their right to freedom of worship and assembly guaranteed them under the Fourteenth Amendment of the United States Constitution and under the Pennsylvania Constitution."

40. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 3, which request is as follows:

"3. The Board of Adjustment abused its discretion in failing to grant the variance."

41. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 4, which request is as follows:

"4. The Board of Adjustment discriminated against appellants in that 'practically no other public place in the Borough of Bethel complied with the terms of the ordinance'."

42. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 5, which request is as follows:

> "5. Freedom of religion occupies a preferred position under the law in contrast to the constitutional rights of owners of property."

43. Appellants except to the Court's refusal of the appellants' request for conclusion of law No. 6, which request is as follows:

> "6. The Court erred in failing to permit testimony as to the existence of other churches, buildings, etc. within a quarter mile of each other for the purpose of establishing the nature of the general character of the neighborhood in order to determine whether the variance will tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with the Zoning Ordinance."

44. Appellants except to the action of the Court in entering the following order:

> "And now, to-wit, this 5th day of December 1955, for the reasons set forth in the foregoing Opinion the decision of the Board of Adjustment of the Borough of Bethel in refusing to grant the variance requested is affirmed, and the appeal hereby dismissed. Appellants to pay the costs."

Ret. Jan. 20, 1956

MICHAEL HAHALYAK,
Attorney for Appellants

SUPPLEMENTAL OPINION AND ORDER OF COURT DISMISSING EXCEPTIONS

Before – McBride, Brown and Guffey, JJ.

Brown, J.

This matter is before the Court en banc on exceptions to the adjudication heretofore made[1], sustaining the refusal of the Board of Adjustment to grant a variance. Appellants filed 44 exceptions, many of which are irrelevant—for example, Exception No. 14, alleging that the appellants conduct their religious services in cramped basement quarters of the house of one of its members. This is an assertion of mere added advantage that might accrue from the granting of a variance, which "is not sufficient to warrant judicial interference with the administrative board's exercise of its discretion in applying the zoning ordiance according to its terms" (Mutual Supply Co. Appeal, 366 Pa. 424, 428).

Exception No. 15, pertaining to the Court's refusal of the request for finding of fact No. 6, that appellants had a registered architect prepare plans for the construction of a church adapted to the property purchased, and had the same approved by the Commonwealth of Pennsylvania pursuant to requirement of law, is immaterial and irrelevant; such action in no wise embodies the prerequisites necessary for a variance or the creation of a vested right (Ventresca v. Exley, 358 Pa. 98; Hershovita v. Irwin, 299 Pa. 155; Harrisburg v. Pass, 372 Pa. 318).

Likewise irrelevant is Exception No. 18, regarding the Court's refusal to affirm appellants' request

[1] Opinion reported in 103 Pittsburgh Legal Journal 489.

for finding of fact No. 10, that the Planning Commission recommended the granting of the permit; since the Board of Adjustment is the only agency that can grant or refuse a variance, subject to the right of appeal (Judge's Appeal No. 2, 89 Pa. Superior Ct. 548, pp. 564, 565).

Further discussion of requests for irrelevant findings of fact is unnecessary (Huron, Aplnt. v. Shomaker, 132 Pa. Superior Ct. 462, p. 466).

The matters pertinent to this inquiry were covered in our opinion above mentioned, with three possible exceptions:

Exception No. 29, assigning as error the Court's refusal of appellants' request for finding of fact No. 24, as follows:

> "24. There are other churches constructed within a quarter mile of each other in the Borough of Bethel";

and Exception No. 35, concerning the Court's refusal of appellants' request for finding of fact No. 30, as follows:

> "30. Practically no other public place in the Borough of Bethel complies with the terms of the ordinance";

will be combined for discussion.

Assuming, arguendo, the above to be true, the structures of said churches and other public places fall within one of the following three categories: (1) nonconforming uses; (2) they exist because of variances granted by the Board of Adjustment; or (3) they are in violation of the ordinance. Whichever category obtains, affords appellants no relief, for first, appellants cannot claim a nonconforming

use, which would be a use existing prior to the enactment of the zoning ordinance; secondly, if the structures were built as a result of variances granted, we are bound by the circumstances in this particular case and evidence of allowances of other variances in the same or similar districts is not admissible (Ventresca v. Exley, supra; Triolo v. Exley, 358 Pa. 555); and thirdly, if the structures are in violation of the ordinance, "it has been held quite uniformly that permitting some persons to violate a zoning regulation does not preclude its enforcement against another" (Valicenti's Appeal, 298 Pa. 276; New Castle City v. Withers, 291 Pa. 216; Hinton v. Zoning Bd. of Adj. 83 District and County 265, 275).

Appellants' 37th assignment of error excepts to the Court's refusal of the request for finding of fact No. 32, as follows:

> "32. The granting of the variance will not tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with the Zoning Ordinance."

Section 4(3) of Article IX of the Zoning Ordinance authorizes the Board of Adjustment "to authorize upon appeal . . . such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done"; and "in issuing such exceptions or variations, the Board shall consider whether such acts will tend to affect adversely the use and development of neighboring properties and the gen-

eral neighborhood in accordance with the zoning ordinance".

In Jennings' Appeal, 330 Pa. 154, at p. 160, the Supreme Court, commenting on the duty of the Board to refuse a variance which would violate the spirit of the ordinance, said:

> "The power to 'vary or modify any of the regulations or provisions' is one that must be exercised '*in harmony with its general purpose and intent* and in accordance with the general or specific rules herein contained so that *the spirit of this ordinance shall be observed,* the public health, the public safety and the general welfare secured and substantial justice done'." (Emphasis ours).

In Ventresca v. Exley, supra, at p. 100, the Court, after reviewing cases where a variance is permissible, cited Jennings' Appeal, supra, saying, inter alia, that a variance is permissible "only where the hardship is unnecessary and the interests of the owners and occupants of the neighboring properties are protected".

In the instant case, the lots upon which the variance is sought are at the intersection of Bethel Church Road and Ft. Couch Road, two heavily traveled highways. In Pincus v. Power, 376 Pa. 175, the lower Court sustained the refusal of the granting of a variance. The Supreme Court, affirming the decision of the lower Court, at pp. 178 and 179, sets forth in its opinion the reasons for the refusal by the Board of Adjustment to grant the variance. Two of the reasons are as follows: "(3) because the erection of additional stores with insufficient parking space on already heavily trafficked

Stenton Avenue, would greatly increase the already hazardous traffic situation; (4) because the variance would be unfair to surrounding property owners who had built their residences and developed their property as residential in accordance with the zoning requirements"; and at p. 180, quoting from the leading case of Devereaux Foundation, Inc. Zoning Case, 351 Pa. 478, said:

> "The power to authorize such a variance is to be sparingly exercised and only under peculiar and exceptional circumstances, for otherwise there would be little left of the zoning law to protect public rights; prospective purchasers of property would hesitate if confronted by a tribunal which could arbitrarily set aside the zoning provisions designed to establish standards of occupancy in the neighborhood."

If the Board cannot arbitrarily set aside zoning provisions designed to establish standards of occupancy in the neighborhood, a fortiori the Board could not arbitrarily set aside regulations designed to lessen and relieve traffic hazards and congestion.

We could not make requested finding of fact No. 32 above, and observe "the spirit of this ordinance" and protect "the interests of the owners and occupants of the neighboring properties".

For the reasons given in the Opinion previously filed, together with those contained in this Supplemental Opinion, appellants' exceptions to the Court's refusal of findings of fact and conclusions of law will be dismissed.

ORDER OF COURT

And Now, to-wit, this 1st day of March, 1956, for the reasons given in the Opinion previously filed in this matter, together with those contained in this Supplemental Opinion, appellants' exceptions to the Court's refusal of findings of fact and conclusions of law will be dismissed. Appellants to pay the costs.

By the Court,
Brown, J.

Eo die, exceptions noted to appellants, and bill sealed.
By the Court,
Brown, J.

RELEVANT PORTIONS OF ZONING ORDINANCE OF THE BOROUGH OF BETHEL NO. 70-11-51

An Ordinance of the Borough of Bethel regulating and restricting the erection, construction, alteration, repair, location and the use of buildings and other structures and the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry or other purposes and establishing building lines upon all public streets, roads, highways, lanes and alleys, and the area of lots: Conferring upon the Borough Secretary or such other official as the Borough Council may designate certain

powers for the enforcement thereof; providing for a Board of Adjustment and the powers and duties thereof, and providing penalties for the violation of the terms and conditions of this Ordinance.

ARTICLE I, SECTION 1. Be it ordained and enacted by the Burgess and Council of the Borough of Bethel, County of Allegheny and State of Pennsylvania, and it is hereby ordained and enacted by the authority of the same: That from and after the passage and approval of this Ordinance the following districts shall be established and the following regulations for the purpose of regulating and restricting the location of trades and industries and the location of buildings and lands designed for specific use and regulating and restricting the erection, construction, reconstruction, alteration, repair or use of building structures, or use of land and regulating and determining the area of yards and the size of lots and other open spaces in connection with buildings hereafter erected or altered, shall be in full force and effect.

SECTION 2. This Ordinance shall be known as the Zoning Ordinance of the Borough of Bethel. A copy of said Ordinance is on file in the Office of the Borough Secretary, Municipal Building, where it may be examined by any persons interested, together with a Zoning Map of the Borough of Bethel, which is hereby made a part hereof.

* * *

ARTICLE III, DISTRICT CLASSIFICATIONS AND REGULATIONS, SECTION 1, General—In order to designate, regulate and restrict the location of residence, commerce, business, trade and industry and the location

of all buildings designed, erected, altered or occupied for specific uses, the Borough is hereby divided into the following eight (8) Districts hereinafter designated as:

One Family Residential District R-1
One Family Residential District R-2
One Family Residential District R-3
Multiple Family Residential District R-4
Neighborhood - Commercial District C-1
Commercial District C-2
Manufacturing & Light Industrial District M.L.I.
Public Reservation District P.R.

• • •

SECTION 3. One Family Residential District—R-1. Uses-One Family Dwelling; Church; Public or Parochial School (certified by State Board of Education) 1. Farming (5 acres or more). Less than five acres —Garden, Nursery, Horticultural, Greenhouse. (for private use only). 2. Accessory Uses incident to any of the principal uses above listed. . . .

• • •

Areas. Each lot in this District shall comply with the following minimum requirements:

(1) Lot Area—21,780 square feet or ½ acre.
(2) Front Yard—50 feet from the established right-of-way line of the thorofare or street.
(3) Side Yard—20 feet on each side; for buildings housing animals, they shall be 35 feet from any property line.
(4) Rear Yard—35% of the depth of the lot and in no event less than 50 feet.
(5) Lot Frontage—100 feet.
(6) Building Area—800 square feet for one-

story dwellings with basement--960 square feet without basement; 600 square feet on the first floor for one and one-half story or two story dwellings.

(7) Maximum Lot Coverage by Building—25% total.

(8) Off-Street Parking—Church School Auditorium, Stadium and similar places of assembly, one car space (300 sq. ft.) for every 5 seats or fraction thereof.

(9) None of the uses listed in Item 8 above, shall be permitted within ¼ mile of each other.

* * *

ARTICLE IX, BOARD OF ADJUSTMENT, SECTION 1. Creation-Members—A Board of Adjustment is hereby established. The word "Board" when used in this Ordinance shall be construed to mean the Board of Adjustment. The Board will consist of three members to be appointed by the Borough Council. . . .

SECTION 3. Appeals—Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department board, or bureau of the Borough affected by any decision of the Borough Secretary. Such appeal shall be taken within a reasonable time, as provided by the rules of the Board, by filing with the Borough Secretary, from whom the appeal is taken, and with the Board of Adjustment, a notice of appeal specifying the grounds thereof. The Borough Secretary shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

* * *

SECTION 4. Powers—The Board of Adjustment shall [illegible] the following powers: ... (3) To authorize upon appeal, in specific cases, such variance from the terms of the Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardships and so that the spirit of the Ordinance shall be observed and substantial justice done.

The variations shall apply principally to height and area requirements such as, among others, when topography or other conditions exist which clearly show a hardship would be caused in requiring full compliance with the requirements of the District.

In issuing such exceptions or variations, the Board shall consider whether such acts will tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with the Zoning Ordinance. The Board may as a condition of issuing such an exception or variation, require such safeguards and restrictions as will protect the neighborhood and not prevent or impair the future use of the land in accordance with the Zoning Ordinance.

In exercising the above mentioned powers, such Board may in conformity with the provisions of this Ordinance, revise or affirm, wholly or partly, or may modify the order requirement, decisions, or determination appealed from and may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the Borough Secretary from whom the appeal is taken.

APPLICATION FOR CERTIFICATE OF OCCUPANCY

THE BOROUGH OF BETHEL
OFFICE OF BUILDING INSPECTOR

Permit No.
Issued
Location *Bethel Church Rd-Oakhurst Plans-Lot #9-Part of #10*
Trustees & Owners *Prentiss P. Swift J. A. Beck Raymond Comodor*
Address *Kingdom Hall-Irishtown Road Library-R.D. #3-Pa.*
Construction of Building (Frame, brick, brick and steel, etc.) *All Brick-Const. & Steel* Number of Stories *1*
Proposed Occupancy *Church*
Proposed number of families
Present Occupancy
Present number of families
Remarks:

Application is hereby made for permission to occupy the premises above described for the purpose herein stated. If such use complies with the provisions of all laws and ordinances and certificate of occupancy is issued, it is understood by the applicant that the said certificate will authorize only the use stated in this application and that such use may not legally be extended or changed without authorization in a new certificate of occupancy. If the building located on these premises or any part of the said building is to be occupied as a dwelling, the applicant understands that the occupancy there-

of is to be limited to the number of families stated in this application.

Date *Oct 26* 1954 *Raymond Comodor (Trustee)*
Signature of Applicant

• • •

[Verification not executed.]

APPLICATION FOR BUILDING PERMIT

THE BOROUGH OF BETHEL

Inspections: Permit No.
1. Fee
2. Estimated Cost
3. Date Issued
4. Date of Application *Oct. 26,* 1954

Location of Property (Including lot number, street and plan) *Bethel Church Road - Oakhurst Plan - Lot #9 - Part of #10*

(Trustees &) Owner *Prentiss P. Swift J. A. Beck Raymond Comodor*

Address *Kingdom Hall Irishtown Road Library - R. D. #3 - Pa.* Telephone *McMurray 6411 R21*

Contractor Address
Telephone

Proposed Use of Building *Church*

Full description of construction *Brick Construction - All Masonry Type*

Is Application for New Building or Addition *New Building*

Any projection beyond Property line *None*

Size of lot *Front 103.07 - Rear App. (52') - 10.6 - 41.35 170.67 (in depth) 170.0*
Distance from street to building line *50'*
Distance from sidelines to building 20'

The applicant hereby agrees to comply with the provisions of all laws and ordinances regulating building construction in the Borough of Bethel.

Raymond Comodor (Trustee)
Applicant

NOTICE OF REFUSAL

Case # 135
Zoning District R-1

LOCATION: *Lot 9 & pt 10 Bethel Church Rd.*

Permit is refused for the reason of non-compliance with the Borough Zoning Ordinance as herewith noted: *Action of Council*

The Secretary of the Borough is required to follow the strict letter of the Borough Zoning Ordinance. The law provides that the Board of Adjustment, upon appeal, may make variations in the ordinance not contrary to the public interest and where under special conditions a literal enforcement of the Borough Zoning Ordinance will result in unnecessary hardship.

If you desire to take such appeal, please bring this letter and the following form, if applicable, to the Board of Adjustment, Borough Building, 5092 W. Library Avenue, Pgh. 34, Pa. The Board holds public hearings the 1st and 3rd Wednesdays of each month. An appeal to be heard on a given Wednesday must be filed with the Board not later than seven

(7) days preceding the hearing. Hearings are held at 8:00 P.M.

Appeal must be made properly. The board will not be responsible for applications and plans not called for within thirty (30) days.

Yours very truly,

THE BOROUGH OF BETHEL
By RUTH NICHOLS D. S.
Secretary

APPEAL

Board of Adjustment
Secretary of the Borough of Bethel
Borough Building
5092 W. Library Ave., Pgh. 34, Pa.

Dear Sirs:

I hereby appeal from the decision of the Borough Secretary in the refusal of permit as applied for.

RAYMOND COMODOR (Trustee)

LETTER STATING REASONS FOR REFUSAL.

COlonial 3-8111 or 3-8113
THE BOROUGH OF BETHEL
Municipal Building
5092 West Library Avenue
Allegheny County Pittsburgh Pennsylvania
October 26, 1954.

Jehovah Witness Church, Bethel Unit
Kingdom Hall
Irishtown Road
R. D. #3, Library, Pa.

Gentlemen:

This is to advise you that in the Special Meeting of the Council of the Borough of Bethel on October 25, 1954, Council took action on your request to erect a Church on Bethel Church Road in the Borough of Bethel.

A motion was made and approved by Council as follows: "that this request for erecting a Church on Bethel Church Road by the Jehovah Witness Church, Bethel Unit, be denied, not on the basis of a Church, but on the basis of non-compliance with the Ordinance, on the basis of creating additional traffic hazards and on the basis of the petition by residents against it".

Very truly yours,

BY RUTH NICHOLS
Secretary
Borough of Bethel

NOTICE OF APPEAL

TO THE SECRETARY OF THE BOROUGH OF BETHEL:

The undersigned appeal from the refusal of the Secretary of the Borough of Bethel, the Council of the Borough of Bethel and the Planning Commission of the Borough of Bethel to grant or to authorize the granting to the undersigned of a building permit for the construction of a church

by the undersigned on Lot No. 9 and part of Lot No. 10, Oakhurst Plan of Lots, Bethel Borough, Allegheny County, Pennsylvania; the undersigned request an exception or variance from the Zoning Ordinance of the Borough of Bethel to authorize the said construction and the undersigned pray that the decision, order or determination of the administrative body below refusing the said building permit be reversed or modified so as to authorize the construction of the said church, and, in support thereof, the undersigned specify the following grounds and reasons therefor:

1. The requested variance or exception will in no wise be contrary to the public interest. The refusal to grant the requested variance will result in an unnecessary hardship so that the spirit of the Zoning Ordinance shall not be observed and substantial justice shall not be done. The construction of the said church will not tend to adversely effect the use or development of neighboring property as intended under the Zoning Ordinance.

2. The plans and specifications for the construction of the said church have been approved by the Department of Labor and Industry of the Commonwealth of Pennsylvania, and by the Planning Commission of the Borough of Bethel. The said church will aid in the beautification of the said area, will in no wise hinder the property values in the said area, and would not unreasonably effect the traffic in the said community.

3. The Secretary of the Borough of Bethel, the Council of the Borough of Bethel and the Planning Commission of the Borough of Bethel committed error in its order, decision or determination denying a building permit and committed a flagrant and

manifest abuse of discretion in refusing to grant the said building permit.

4. The Zoning Ordinance of the Borough of Bethel upon which the said Borough Secretary, Council and Planning Commission relied upon in refusing to grant the said building permit, insofar as its applicability to the construction of the said church is concerned, is illegal, unreasonable, arbitrary and unconstitutional under the First and Fourteenth Amendments of the United States Constitution and also of the Constitution of Pennsylvania.

5. The said Zoning Ordinance, insofar as its applicability to the granting of a permit for the construction of said church is concerned, imposes an undue hardship upon appellants.

6. The said Zoning Ordinance, insofar as its applicability to the granting of a permit for the construction of said church is concerned, has no substantial relation to the health, safety, morals or general welfare of the community, and is not uniform in its application and is discriminatory.

7. The said Zoning Ordinance, insofar as its applicability to the granting of a permit for the construction of said church is concerned, is vague and indefinite and fails to set forth a proper and definite standard for its application.

8. The said Borough Council, the Borough Secretary and the Planning Commission have acted arbitrarily and capriciously and are prejudiced toward the undersigned and their church and by reason thereof have arbitrarily refused the granting of the said permit.

9. Appellants assign as error that the denial of the application for a permit to use the property

as a place of public worship is arbitrary, capricious, unreasonable, without basis in fact and in law, discriminatory, and in violation of the First and Fourteenth Amendments to the Constitution of the United States and of the Constitution of Pennsylvania.

WHEREFORE, the undersigned respectfully pray Your Honorable Board to reverse the order, decision or determination below and to make such order authorizing the granting of the said building permit.

_____

_____

_____

Trustees, The Jehovah's Witnesses,
Bethel Unit.

TRANSCRIPT OF PROCEEDINGS BEFORE BOARD OF ADJUSTMENT

Hearing held before the Board of Adjustment, Borough of Bethel, in the Municipal Building, Bethel, Allegheny County, Pennsylvania, on Wednesday, November 3, 1954 at 8:00 O'Clock P. M.

Members of the Board of Adjustment Present:

Mr. Edward J. Plocki, Chairman;
Mr. N. Charles Wukeson;
Mr. Frank Rayburn.

Counsel Present:

Michael Hahalyak, Esq., representing the Appellants;

Owen B. McManus, Jr., Esq., representing the Board of Adjustment;

DAVID W. CRAIG, Esq., representing Oakhurst Civic Association.

APPELLANTS' CASE

HOMER ROBERT DAWSON, a witness called in behalf of the Appellants, first having been duly sworn, testified as follows:

BY MR. PLOCKI:

Q What is your name?

A. Homer Robert Dawson.

Q What is your address?

A Clifton-Library Road, R. D. 5, Library, Pennsylvania.

Q What interest do you have in this case?

A I am minister of the Church in question, the Bethel Unit of The Jehovah's Witnesses.

Q You are a minister?

A That is right, and I am making this Appeal along with the trustees of the proposed building.

DIRECT EXAMINATION

BY MR. HAHALYAK:

Q What is your name?

A. Homer Robert Dawson.

Q You are presiding Minister of the Bethel Congregation?

A That is correct.

Q Do you have at the present time charge of the Bethel Unit of The Jehovah's Witnesses?

A Yes; sir.

Q Do you have a church, at the present time, in Bethel Borough?

A Yes.

Q Where is that church located?

A In the basement of a residence.

Q You mean in a basement room of a residence?

A Yes.

Q Are those quarters adequate for your church purposes?

A No, sir, they are very inadequate.

Q For this reason, have you purchased property elsewhere in Bethel Borough?

A Yes, sir, we have.

Q Where have you purchased this property?

A On Bethel Church Roard, at the corner of Bethel Church Road, close to the intersection there.

Q In whose name is that property?

A It is now in the names of J. A. Beck, Prentice [sic] T. [sic] Swift and Raymond Commodor [sic].

Q I show you a piece of paper and I ask you to tell me what that is?

A This is the Deed to the Property that we have purchased. The Deed is in the names of the Trustees.

By Mr. Hahalyak: This Deed has been marked for the purpose of identification Appellants' Exhibit "A", and by stipulation we will incorporate the Deed into the record.

By Mr. Hahalyak:

Q You say that you purchased this property because of the inadequacy of the present premises for your church purposes?

A That is true.

Q After you purchased this property, did you then go to the Secretary of the Borough of Bethel for the purpose of securing a building permit, and

present a plan, in duplicate, drawn to scale, showing the location of the said ground to be built upon, the dimensions of the structure to be built thereon, and all information that he requested?

A Yes, sir.

Q I show you two plans, and I ask you what those plans are?

A These are plans and specifications of the structure to be built upon Lot Number 9 and part of Lot Number 10, in the Oakhurst Plan of Lots, in Bethel Borough; also a plan of Lot Number 9 and part of Lot Number 10

By Mr. Hahalyak: Appellants offer into evidence Appellants' Exhibits "B" and "C", Exhibit "B" being a plot plan of the premises in question, and Exhibit "C" being a plan showing the dimensions of the structure to be built, consisting of three large-size sheets.

By Mr. Hahalyak:

Q Are these the plans that you submitted to the Secretary of the Borough of Bethel?

A That is correct, sir.

Q Under the laws of the Commonwealth of Pennsylvania, you are required, where a public building is involved, to have the plans approved by the Department of Labor and Industry, in Harrisburg. Did you travel to Harrisburg, yourself, with these plans, to obtain and receive the approval of the Department of Labor and Industry?

A Yes, sir, I did.

Q And is that approval noted on these plans which were submitted to the Secretary of the Borough of Bethel?

A Yes, sir, the approval is stamped on those plans.

Q Now, because this is a public building, the Borough Secretary referred it to the Planning Commission, is that right?

A That is right.

Q And the Planning Commission submitted the report which has been offered in evidence here?

A That is right.

Q Now, you come before the Board of Adjustment here and ask for a variance, is that true?

A That is correct.

Q Mr. Dawson, will the front yard of your property be fifty feet from the established right-of-way, road, thoroughfare or street?

A Yes.

Q Mr. Dawson, will the side yards of your property be twenty feet on each side?

A Yes.

Q Mr. Dawson, will the rear yard of your property be thirty-five percent of the depth of the lot and in no event less than fifty feet?

A Yes, sir.

Q Mr. Dawson, will the lot frontage be at least 1,000 feet?

A Yes.

Q Mr. Dawson, will the building area be 800 square feet for one-story dwellings, with basement 960 feet?

A I cannot say definitely; I believe it is but I would have to figure that out.

By Mr. Craig: We will admit that the proposed interior area of the building meets the

Ordinance requirement for minimum interior floor area.

By Mr. Hahalyak:

Q Mr. Dawson, will the Church have off-street parking, one car space, 300 square feet, for each 300 square feet or fraction thereof of floor area?

A Yes.

Q Mr. Dawson, will this church building be within one-quarter of a mile of another building?

A Yes.

By Mr. Plocki: By "another building" you mean what, a residence, a public building, or what?

By Mr. Hahalyak: It means a church, school, auditorium, stadium, or similar place of assembly.

By Mr. Hahalyak:

Q Will this church structure be within one-fourth mile of another church, or school, or auditorium, or stadium, or similar place of assembly?

A Yes.

Q How near will it be to the nearest church, school, auditorium, stadium, or similar place of assembly?

A From the report, I believe it was the Planning Commission Chairman—

By Mr. Craig: Objected to as hearsay, not because I want to be technical, but because we can probably get better means of proof than hearsay statements; I just make my objection to indicate that this witness is testifying from what somebody else told him, and not from his own knowledge or his own observation.

By Mr. Hahalyak:

Q From your own observation, approximately how close would it be to the nearest church, school, auditorium, stadium, or similar place of assembly?

A I would say in the neighborhood of 1,000 feet.

By Mr. Hahalyak: Now, it appears that the sole question revolves around sub-paragraph (9) of Section 3 of Article III, that, "None of the uses listed in Item 8 above, shall be permitted within ¼ mile of each other" I would like now to offer evidence pertaining to this particular point.

By Mr. Hahalyak:

Q Mr. Dawson, how many members are there in your congregation at the present time?

A We now have forty.

Q Forty members?

A Forty members.

Q Not forty families, but forty members?

A Forty members.

Q What is the capacity of this structure that is to be erected?

A We will be able to handle eighty-five, comfortably.

Q Eighty-five members?

A Eighty-five members, yes, sir.

Q And you say your present membership is what?

A Forty members at the present time.

Q Would the rear parking area, the rear lot of your property upon which the church will be enacted, be sufficient to house the forty members or, rather, to take care of the parking area for the forty members?

A Yes, nicely.

Q In other words, the rear lot is sufficient in size to take care of all the parking needs of your present congregation?

A That is true.

Q Suppose your congregation increases to eighty-five members, would your own parking area, your own lot, take care of the additional parking?

A Yes, we would have room for nine more cars

Q Where would they go?

A Well, we have two sides on which cars could be parked.

Q Let us assume that your congregation would exceed eighty-five members, what would be done?

A Well, under those circumstances, we would recommend that the Society sub-divide our congregation again.

Q Is that customary?

A Yes, it is.

Q In other words, the additional members would be taken care of at another church, and not at the church in question?

A That is correct.

Q Would the present membership create a traffic hazard in that particular area?

A Definitely not.

Q Are there any ways of reaching this church besides by automobile?

A Yes, there is bus and street-car transportation.

Q Would some of your members reach church by bus and street-car facilities?

A Yes, they could.

Q But even if they all had automobiles, there

would still be sufficient parking space on your lot, is that correct?

A That is correct, both now and in the future.

Q Will you tell us what activities are carried on in this church?

A On Sundays, we have a public bible lecture, at which one of the representatives of the Watch Tower Society speaks for one hour, and all those present are encouraged to talk to us and to ask questions afterwards. Following that, we have an hour Watch Tower study, a study of the publications of the Society, which is conducted by question and answer method, which is very orderly and very instructive on bible knowledge.

Q What would be the hours of use, on Sundays, of the premises?

A 3:00 to 4:00 and 7:00 to 8:00.

Q During those periods of time, on Sundays, is there heavy traffic in that area?

A No.

Q What other days of the week do you have church services?

A Friday evenings between 7:30 and 10:00.

Q Would traffic be heavy, in that area, during that period of time?

A Traffic is no heavier than usual during that period of time.

Q On what other days of the week do you have church services?

A On Tuesday evenings.

Q For how long a period of time?

A One hour.

Q And is that the total period of time in a week that the premises are used for church services?

A Yes, except for individuals who care to use the church as a place of study.

Q On what days of the week, or what hours, would that be?

A At anytime.

Q Would the attendance be light or heavy at those times?

A Very light.

Q Approximately, how many persons would there be in attendance?

A Well, maybe three persons on any week-day.

Q And would that constitute the whole use of this structure, week by week, throughout the entire year?

A Yes, sir, except that twice a year we have a traveling minister who delivers lectures.

Q And at those times would traffic be any heavier than normal?

A I would say no.

Q Is there any vacant area nearby which would be available for parking?

A Not to my knowledge.

Q I am speaking of nearby vacant areas.

A Oh, there are off-streets.

Q I show you these photographs, and I ask you to tell us whether these are photographs of the area near the property in question?

A Yes, they are.

Q Is there considerable vacant area adjoining this lot?

A Yes, sir, there is.

Q The population is not dense in that area?

A No, indeed.

Q How many members of your congregation have cars, do you know?

A Yes, sir, thirteen cars in our congregation.

Q Would there be any need for parking in front of this church?

A No.

Q Is there a Stop Sign nearby this property?

A Yes, sir, there is.

Q Is there a Slow-Speed Sign nearby this property?

A No, I do not believe there is.

Q A Slow Speed Sign could be erected in the nearby area?

A Yes, sir.

Q If one were erected in the nearby area, it might help to correct any traffic problem, is that correct?

A Yes, if we had any traffic problem.

Q Well, any traffic problem that may arise, it would help considerably?

A Oh, yes.

Q Now, would this structure in any way depreciate the values of nearby properties, in your opinion?

A Definitely not.

Q Do you have a drawing of this property, so that the Board of Adjustment may view it and get a realistic picture of what is going to be constructed on this property?

A Yes, sir, I have

Q Who prepared this drawing?

A The Architect, Mr. Alexander Sansosti.

Q Is he a Registered Architect?

A Yes, sir, he is.

Q Is this a picture of the proposed church?

A Yes, sir, it is.

By Mr. Hahalyak: We offer in evidence Appellants' Exhibit "E", a drawing made by the registered architect of the proposed church.

By Mr. Hahalyak:

Q Mr. Dawson, if a traffic problem or hazard should arise, is it your position that you could take care of such problem or hazard, through other means, if it became necessary?

A That is right.

Q Could you have a policeman on duty at certain hours if it became necessary?

A If it would became necessary, yes, sir.

Q How many cars are there in your congregation at the present time?

A Thirteen cars.

Q Those persons that have those thirteen cars, could they come by street car or bus, if necessary?

A Not all of them, no.

Q But some of them could?

A Yes.

Q About how many?

A About three or four.

Q This building in question, can you tell us what the fair market value of that building would be, after it is constructed?

A Well, I stated once before that the cost would be Thirty Thousand Dollars, but its market value would be $45,000 to $50,000.

Q In what way do you arrive at that figure for the market value?

A Well, because most of the skilled and unskilled labor, we are capable of doing ourselves.

Q In other words, your congregation would use their own labor in the construction of this church?

A Yes, sir.

Q And the $30,000 represents the cost of the materials?

A Yes, approximately.

Q Your present location is wholly inadequate for a meeting place for your church purposes?

A Yes, sir, it is.

Q And it would stunt your development?

A Yes, sir.

Q In other words, there is a definite need and necessity for this church?

A Yes, sir, there is.

Q I believe there is a Presbyterian Church within this quarter-mile area?

A That is right.

Q Does that church have a parking area of its own?

A Yes, sir, it does.

Q And that parking area would minimize any traffic problem, is that correct?

A I think it would.

Q Are there any other churches in that community which, in the recent past, were erected within this quarter-mile area, if you know?

A Yes, sir, one is Saint Thomas Roman Catholic Church.

Q When was that built?

A In August of this year.

Q And that is within a quarter-mile area of another place of assembly?

A Yes, sir, it is.

Q In other words, there was an exception granted in that particular case?

A That is right.

Q And that has been within the very recent past?

A Yes, sir.

Q Has your church built a structure in the City of Pittsburgh?

A Yes, sir.

Q And that is in the most expensive area of the City of Pittsburgh, I believe?

A Yes, sir, that is right.

Q And the City of Pittsburgh permitted the construction of that church?

A Yes, sir.

Q And has that church, to your knowledge, affected the property values of properties that are within walking distance of that property?

A No, it has not.

Q And are those properties nearby, to your knowledge, of the values of $75,000 to $100,000?

A Yes, sir, I would imagine so.

Q Are there any houses in the vicinity of this church in question, of the value of $75,000 or $100,000?

A If there are, I have not seen them.

Q It is your position that this Zoning Ordinance, in your case, is unreasonable, arbitrary and capricious, is that right?

A That is right.

Q And that it is unconstitutional in its application to your particular situation, is that right?

A Yes, sir.

By Mr. McManus: I hardly think he is qualified to testify as to whether or not this

Ordinance is unconstitutional.

By Mr. Hahalyak: You may cross examine.

Cross Examination

By Mr. Craig:

Q Mr. Dawson, isn't there something unique or unusual about this lot of yours?

A Yes.

Q Tell us what it is?

A Well, it is pie-shaped; it is larger in the front than in the rear.

Q Well, in respect to its being pie-shaped, how does it differ from the adjoining lots?

By Mr. Hahalyak: I do not see the relevancy of this.

By Mr. Craig: I will make an offer at sidebar.

(Discussion, off the record, between counsel and the board)

By Mr. Craig:

Q Mr. Dawson, I was asking you to tell us in what significant aspects your lot differs from the adjoining lots on either side of it?

A I would say none as far as I can see.

Q They, too, are pie-shaped?

A Partially so.

Q They, too, have a rising grade, like your lot?

A Like all of Bethel, yes.

Q Does your lot have any high mounds or deep valleys in it?

A It just starts at the bottom and goes up.

Q Gradually?

A Yes.

Q Do the adjoining lots have any high mounds or deep valleys in them?

A No, I do not believe so.

Q Then, in general, you would state to this Board that there is nothing unique or unusual about your lot as compared to the adjoining lots?

A No, only that it is very well located for street car and bus service as well as for automobile transportation; it is very well located for a church.

Q Street cars and busses are also available for other lots along Bethel Church Road, are they not, street cars and busses are also available for the lots on either side of your lot?

A That is true.

Q Is it your understanding that this lot and structure will be tax exempt?

A Definitely.

By Mr. Hahalyak: Objected to as irrelevant to the issue here

By Mr. Plocki: Well, he has answered the question; it may have a bearing upon it, to some extent. Proceed.

By Mr. Craig:

Q You have not measured the distance between your lot and the Bethel Presbyterian Church, have you?

A We have, yes.

Q By what means have you measured it?

A By a speedometer.

Q What speedometer reading did you obtain?

A To tell you the truth, I could not tell you definitely, I cannot remember.

Q Your speedometer does not read in feet, does it?

A No.

By Mr. Hahalyak: I am willing to show the figures submitted by the Planning Commission.

By Mr. Craig: I am concerned about the basis upon which this witness testified that it was 1,000 feet from the other church.

By the Witness:

As I recall, the original estimate was 230 feet short of the 1,320 feet necessary, and Mr. Commodor [sic] and, I believe, Mr. Beck, measured it, and I believe their measurement was close to 900 feet or 1,000 feet, - I do not know exactly.

By Mr. Craig:

Q In providing off-street parking on this lot, you propose to have a driveway in from Bethel Road?

A Yes.

Q Doesn't the side-plan submitted by you show the driveway entering Bethel Road on the side of your lot nearest to Lot No. 8?

A Yes, that was the original drawing.

Q In other words, entering Bethel Road near the northerly side of your lot?

A That is right.

Q You stated to this Board that there is vacant area available, outside your lot, in the immediate neighborhood, which would be available for parking?

A No, I did not state that.

Q Do you then say there is no vacant area available for off-street parking, in that immediate area, outside of your own lot?

A That is my knowledge of it.

Q There is no such vacant area available for off-street parking, in that nearby area, outside of your own lot?

A That is correct.

Q Now, as I recall, you stated that you presently hold meetings, and plan to hold meetings, on Tuesdays, Fridays and Sundays, is that correct?

A That is right.

Q Can you be positively certain that your church would not be used for meetings at any other times, - can you guarantee the Borough officials that there will be no other meetings held by your church, at other times?

A No, I certainly cannot.

Q If the needs and desires of your congregation demand, wouldn't you be willing to hold meetings more frequently?

A Certainly, but the point is this, The Jehovah's Witnesses are a society of ministers; they do not spend all their time in a building just for the purpose of meetings; they go out and preach from door to door; the use of the structure is for additional study, but it is open for use every day in the week.

Q You testified that you live on the Clifton-Library Road?

A That is right.

Q How far is that from this lot in question?

A I would say approximately two miles.

Q So that in the recent past, you have been living two miles away from the intersection in question?

A Yes, for the last seven years.

Q In the past seven years altogether, if you

can estimate for us, how much time have you spent at this particular intersection?

A Well, I have gone by there a great many times; our preaching work is done in all the different parts of Bethel. I could not estimate, in hours, the time I have spent there.

Q You have not lived there?

A No.

Q You have not spent whole days there?

A No.

Q Can you tell us on what basis you are able to testify as to whether or not a traffic hazard would exist there?

A Well, for this reason: I travel that road a good deal; I am a bricklayer by employment, I work at that trade four to six days a week; in addition to that, for the past two and one-half years, I have spent 100 hours a month in my ministerial work, in my Gospel preachings, and a great portion of that time has been spent all over Bethel. So I believe I am pretty familiar with that particular area.

Q You have observed traffic at that intersection when passing by?

A That is true.

Q What kind of seats do you propose to provide in this church?

A That has not definitely been determined as yet, whether there will be fixed seats or portable.

Q Tell us then on what basis you can estimate the seating capacity?

A Well, in the past, we have engaged many halls for public assembly, and in trying to determine the number of people that we would have in attendance and how to provide for them, we figured on

the basis of about eight square feet per person, and in a large assembly hall we have been able to accommodate a great number of people on that basis of eight square feet per person. However, in this instance, we have figured on the basis of approximately ten square feet per person, allowing a comfortable amount of space for a capacity of eighty-five persons, and that was also the recommendation of the architect.

Q In other words, your space could be stretched to take care of more than eighty-five persons?

A Possibly.

Q You have stated that you could take care of eighty-five persons, comfortably?

A That is right, nicely.

Q So that without any additional structure or building, your seating capacity could be increased over and above eighty-five persons?

A It possibly could.

Q I believe you stated at one time that it is the practice of The Jehovah's Witnesses congregation to subdivide when it reaches the number of 200?

A No, no that is the maximum, that is the suggested figure by the Watch Tower Society.

Q But that figure is not binding upon you?

A No.

Q And if the portion of your congregation which was to split up found it difficult to find new quarters, there is no reason why your congregation would not continue to take care of them, is there?

A No, there is no set rule.

Q You stated, I believe, that you have sufficient parking space for your present membership?

A Yes.

Q Where is your parking area located?

A In the rear.

Q Let us assume that you have a seating capacity of eighty-five, you are required to provide seventeen parking spaces, is that correct?

A Well, five divided into eighty-five, gives you seventeen.

Q The Ordinance requires 300 square feet for each parking space?

A Yes.

Q Do you have sufficient room for 17 parking spaces in the rear yard area of your church?

A No.

Q Your present seating capacity, according to your own testimony, is eighty-five?

A That is the estimated seating capacity when the church is erected. At the present time our congregation consists of forty members.

Q If your seating capacity is eighty-five, your parking space is insufficient to comply with the Ordinance, in your rear yard area?

A You are assuming that we have eighty-five in attendance, and I am saying to you that our present congregation consists of forty members, and ten cars can be nicely taken care of in our parking area.

Q Let us assume that your congregation reached 200, since it is possible that a congregation can reach that size, should your seating capacity reach 200, forty parking spaces would then be required, isn't that correct?

By Mr. Hahalyak: Ojected to.

By Mr. Plocki: Objection sustained.

By Mr. Craig:

Q How far beyond a seating capacity of eighty-five people could that structure be increased?

By Mr. Hahalyak: I object to the question as being pure conjecture, and something that this witness is not qualified to answer.

By Mr. Plocki: Objection over-ruled.

A I do not know, I do not know what the structural limitations are, I have no way of knowing that.

By Mr. Craig:

Q Tell us what the height of the highest point of the roof of this building will be above the grade at the foundation of the building?

By Mr. Hahalyak: Objected to. The plans speak for themselves and they are before this Board.

By Mr. Craig: It appears to us that this building violates the Ordinance in another respect which has not been mentioned, that is, that it violates the height ordinance.

By Mr. Plocki: Objection over-ruled.

By Mr. Craig:

Q Do you know how high this proposed building would be from the ground immediately adjacent to the foundation, to the highest point of the roof?

A I think when I was before Council, that question was asked me; I do not believe that it was stated just exactly in those words, but if you will refer to those minutes—

By Mr. Craig: All right, we will waive our right to question Mr. Dawson on this point, and we will ask the architect this question.

REDIRECT EXAMINATION

BY MR. HAHALYAK:

Q Mr. Dawson, what is the average attendance of your membership, at church, on Sundays and the other days you have mentioned?

BY MR. CRAIG: Objected to as highly immaterial.

BY MR. PLOCKI: Objection over-ruled.

A We average twenty-eight for our Watch Tower attendance, and for our other services we average twenty-five.

Q On cross examination, you referred to the parking area in the rear of your lot?

A Yes.

Q How many cars can that parking area take care of?

A Ten cars.

Q How many cars could be taken care of in the front and on the sides, in addition to thoses ten?

BY MR. CRAIG: If I remember rightly, my questions was objected to on the grounds that the plan spoke for itself.

BY MR. HAHALYAK: All right, I will not go further into it. The plan speaks for itself.

BY MR. HAHALYAK:

Q Mr. Dawson, is this the only Church of the Jehovah's Witnesses in Bethel?

A Yes, it is.

BY MR. PLOCKI: We are concerned here with a hardship. Let us get some testimony on that point.

By Mr. Hahalyak:

Q Is it a burden upon you to continue your functions at your present location because of the congested nature of those premises?

A Yes, sir, it is. We are in a position where we are meeting in a basement recreation room, which is considerably crowded and it just does not lend itself to church meetings. A church should be out in public, and available to the public, and as all of these other church organizations have the right to exercise their freedom of worship, and as we have our own property we want that same freedom, we want to build our church and invite people there.

By Mr. Craig:

Q Your Trustees purchased this lot after the Zoning Ordinance had been enacted, is that not correct?

A That I do not know.

By Mr. Hahalyak: The record speaks for itself.

By Mr. Craig:

Q If you know, when did your trustees purchase this lot, was it this year?

A This year, yes, sir.

Q Did you examine into the Zoning requirements before they purchased it?

A I did not. I was not aware of any violation of any ordinance until we came over for a permit.

By Mr. Plocki:

Q You said something about the Presbyterian Church having a parking lot?

A Yes, sir.

Q Were you assuming that you would use their parking lot for your members?

A No, sir.

By Mr. Wukeson:

Q I think you testified that you were 220 feet away from the Presbyterian Church or from another church?

A No. I think I stated that the report we received from the Planning Commission showed that we were 220 feet short of the required quarter mile distance.

Q Do you have that report?

A No, I do not, and I am not sure that that is exactly what it stated, but if I remember correctly, the report of the Planning Commission stated that we were 220 feet short of the required quarter-mile distance; we were particularly interested in that because that was the only violation they could find.

Q According to my figures, there are 5,280 feet in a mile?

A That is right.

Q A quarter of a mile would be 1,320 feet?

A That is right.

Q Then, as you stated, if you are only 1,000 feet away from this other church, you are 320 feet short of the required quarter-mile distance?

A I believe I stated that I was not sure of the exact distance.

By Mr. Plocki: What we are concerned about is whether or not there is a hardship in this case. Let us have some testimony on that point.

By Mr. Hahalyak:

Q Mr. Dawson, is your church a rich church?

A We are all working people.

Q Did you have difficulty in obtaining the money to purchase this property?

A Yes.

Q Considerable difficulty?

A Yes.

Q Have you and your members had to undergo considerable expense and time in order to get this matter started?

A Yes, sir, plenty.

Q Have you already gone to the trouble and expense of having plans and specifications prepared and going into detailed matters concerning the construction of this church?

A Yes, sir, we have.

Q And has this involved considerable time of each and every member of your congregation?

A It certainly has; it really has taken us away from a great deal of our preaching work.

Q Is your freedom of worship and assembly limited by reason of the denial of this Permit?

A It definitely is.

Q And is that of the utmost importance to you and to your members?

A It certainly is.

By Mr. Craig:

Q Before you went to this trouble of preparing plans, and so forth, did any of your congregation consult with the Borough Officials concerning the zoning ordinances?

A No, sir, they did not.

Mr. Alexander Sansosti, a witness called in be-

half of the Appellants, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAHALYAK:

Q What is your name, sir?

A Alexander Sansosti.

Q And your address?

A 3113 Hillcrest Road.

Q What is your occupation or profession?

A I am a registered architect.

Q Mr. Sansosti, have you planned, designed and built numerous houses?

A Yes, sir.

Q And buildings and churches?

A Yes.

Q Were you requested by the Appellants in this case to design their church?

A Yes.

Q Did you design their church for them?

A Yes.

Q There is in evidence a drawing of the church which has your name on it. Was that prepared by you?

A Yes, sir.

Q And is that the church that would be constructed on these premises?

A Yes.

Q Does that structure conform to the requirements of the zoning ordinance, other than the quarter-mile area?

A Yes, sir, I am quite sure of that.

Q Would this structure beautify the surrounding area?

A Yes, sir, it would.

Q Would it in any way depreciate the values of the surrounding properties?

A By no means, no.

By Plocki: Let us confine ourselves to this hardship proposition.

By Mr. Hahalyak: You may cross examine.

Cross Examination

By Mr. Craig:

Q Mr. Sonsosti, is there anything about the physical topography of this lot that is unique or unusual?

A I do not understand your question.

Q I am simply asking you whether or not, as a matter of fact, there is anything unique or unusual about the topography of this lot?

By Mr. Hahalyak: Objected to. That is a matter of law.

By Plocki: Objection over-ruled.

Exception noted and bill sealed. (Seal)

A I think it is in a fairly good location, if that is what you mean.

By Mr. Craig:

Q Does the topography of this lot differ from the adjoining lots?

A I would say it is about the same grade, the grade is pretty much the same as the adjoining lots, if that is what you mean.

Q Does the dimensions of this lot differ from the adjoining lots?

A Well, it is pie-shaped. Aside from that, I would say it is pretty much the same.

Q Now, I show you a print, and I ask you to tell the Board what that purports to be?

A This is a plot plan of the whole area. This is the revised Oakhurst Plan.

(Fifteen minute recess)

MR. ALEXANDER SANSOSTI resumes the stand; cross examination continued as follows:

BY MR. CRAIG:

Q Mr. Sansosti, I ask you to look at this print marked Objectors' Exhibit No. 1, and I direct your attention particularly to Bethel Church Road, between Bethel Presbyterian Church and the lot in question, and I ask you is there a distance marked there?

A Yes, 847.17 feet.

Q So that the distance from Marshall Road intersection to Bethel Church is 847.17 feet?

A According to this map, yes, sir.

Q How wide is Marshall Road, approximately?

A I would say thirty feet.

Q So that the total distance would be approximately what?

A About 877 feet.

Q You, of course, are familiar with the building plans for this church in question?

A Yes.

Q What is the height from the ground level at the foundation to the highest point of the roof? You can look at the building plans if you wish?

A To the highest point of the building, which happens to be the front of the building, it is 14 feet 2 inches to the top of the roof.

By Mr. Hahalyak:

Q Mr. Sansosti, in the event this structure would exceed, let us say, the height limitations, that can be taken care of very easily, can it not?

A That is right.

Q The matter of excavation would be the sole problem?

A That is right.

Q You could excavate to a degree necessary to bring it within the height limitations?

A That is right.

Q Mr. Sansosti, in your opinion, is this piece of property ideally suited for church purposes?

A I think it is ideally suitable for the purposes of this church, yes, sir.

Q Why is it ideally suitable?

A Because it has all transportation necessary, buses, street cars, and so forth.

Mr. Prentiss Swift, a witness called in behalf of the Appellants, first having been duly sworn, testified as follows:

Direct Examination

By Mr. Hahalyak:

Q What is your name, sir?

A Prentiss Swift.

Q And your address?

A Oakhurst Plan of Lots, No. 3029 Hillcrest Road, Pittsburgh 32.

Q In the Borough of Bethel?

A Yes.

Q Are you one of the Appellants in this case?

A Yes, sir, I am.

Q Are you a trustee named in the deed of this property?

A Yes, I am.

Q You heard Mr. Dawson testify in this case?

A Yes, I did.

Q How would the refusal to grant a Permit in this case hurt your congregation?

A Well, in the first place, our present meeting place is wholly inadequate; we are meeting in a game room, in the basement of a residence; we are cramped for space, and it would certainly be a hardship if we are denied this building permit to proceed with the construction of our church. We have already gone to considerable expense; this is a most acceptable place to build a church, and it is the only piece of property at that time that was available for the type of structure that we propose to build.

Q Is there any other property in that immediate area which would have been available to you for the construction of this church?

A I know of none.

Q What type of work do you do?

A I am a buyer.

Q In the event that the height of your structure is in excess of the legal limit, what do you intend to do?

A Well, as stated by our architect, Mr. Sansosti, we would take steps to comply with the Borough ordinance, which could very easily be done.

Q You say you heard Mr. Dawson testify here?

A Yes, sir, I did.

Q If I were to ask you the same questions that

were asked Mr. Dawson, would your answers be similar to his?

A Yes, sir, they would.

By Mr. Wukeson:

Q Are you one of the owners of the lot in question?

A Yes, I am.

By Mr. Hahalyak:

Q You live nearby this particular piece of property?

A Yes, sir, pretty close.

Q In your opinion, would this proposed structure in any way depreciate the values of properties in that immediate vicinity?

A No, sir, on the other hand I believe it would enhance the values.

Q Is it a hardship for the members of your congregation to travel to the place where you presently have your church?

A Yes, sir, insofar as it consumes more time to get there, and the fact that we are in very cramped quarters.

By Mr. Rayburn:

Q What business are you in?

A I am a buyer for the United States Steel Corporation.

By Mr. Plocki:

Q Where do you live?

A In the Oakhurst Plan.

Q How far are you located from this proposed church?

A About 300 feet straight across, — I live across the street, down one block.

Q You were not the original owner of this ground in question?

A I purchased it in behalf of the Trustees.

Q But you were not the original owner?

A No, I was not. I was on a committee of the members of our congregation who were interested in obtaining a centrally located piece of ground upon which to construct this church, and in our opinion this was the best piece of property available for the construction of our church.

Mr. Raymond Comodor, a witness called in behalf of the Appellants, first having been duly sworn, testified as follows:

Direct Examination

By Mr. Hahalyak:

Q What is your name, sir?

A Raymond Comodor.

Q And your address?

A McMurray Road, Peters Township, R. D. 2, Canonsburg, Pennsylvania.

Q Are you one of the Appellants in this case?

A Yes, I am.

Q Are you a trustee of the property in question?

A Yes, sir.

Q Were you a member of the Committee of your congregation who investigated various locations in the Borough of Bethel in order to find a location available and suitable for the building of your church?

A Yes, I was.

Q What conclusion did you come to?

A Well, after study, investigation and consultation with the other members of the Committee and

the members of our congregation, we concluded that this property in question was ideally suited for the purposes of building our church.

Q Were you present here and heard the testimony of Mr. Dawson and Mr. Swift?

A Yes, sir, I was.

Q If you were asked the same questions, would your answers corroborate their testimony?

A Yes, sir, they would.

No Cross Examination

(And now, November 3, 1954 at the hour of 11:30 O'Clock P. M., the hearing was adjourned to reconvene on Tuesday, November 9, 1954 at 8:30 O'Clock P. M.)

Adjourned

And now, Tuesday, November 9, 1954 at the hour of 8:30 P. M., the hearing reconvened pursuant to adjournment.

Appellants' Case Continued

Raymond Comodor, a witness recalled on behalf of Appellants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Hahalyak:

Q Mr. Comodor, what is the membership of your church?

A Forty individuals.

Q You are one of the owners of this piece of property and a trustee of the Church?

A Yes, sir.

Q Before you purchased this property, was there a committee appointed by the Congregation to make a search for available properties suitable for a church site?

A Yes, sir, there was.

Q Of whom did that committee consist?

A Myself, Mr. Swift and Mr. Beck.

Q When was this committee formed?

A About May of 1954.

Q At the present time, where are you carrying on your Church services?

A In the game room in the basement of the residence of one of the members of the Congregation, on Irishtown Road.

Q Are your present quarters congested?

A Yes, definitely.

Q And for that reason, was this committee appointed to search for a suitable location for the construction of a Church?

A Yes, sir, and that is what we did.

Q For how long a period of time did this committee search for such a location?

A Well, during the months of May, June and part of July, 1954, until we found a suitable place, along towards the end of July.

Q That covers a period of almost three months?

A That is right.

Q During that period of almost three months, what conclusion did your committee come to as to a proper site for the location of your church?

A Well, we looked at quite a few different pieces of land, even at some buildings, for that matter. However, this piece of property that we now own was the only one available that was ideally suited

for our purposes; it was in a section where any of our members who did not have cars could get to by street car or bus; it was also in the center of the territory assigned for our Congregation of The Jehovah's Witnesses; in fact, it was the only site that would be suitable, that was available, for the purposes of a Church.

Q Now, when you purchased this property, you have stated that you had a membership of forty?

A That is right, sir.

Q Now, as to parking facilities, how many cars can be parked on this lot?

A Well, at least 25 or 26 cars.

Q Does that include the side areas of this property?

A No, sir, it does not.

Q If you include the side areas, about how many cars could be parked on this property?

A About thirty.

Q. What is the main street or highway on which your property fronts?

A Bethel Church Road.

Q Is there any other road by which you have ready access to your property?

A Yes, Crest Way.

Q Is Crest Way maintained by the Borough?

A I understand so, yes, I understand that Council has approved it.

Q Where is Crest Way located? Where is it located in reference to your property?

A In the rear of our property.

Q Is that a much traveled street?

A No, sir, very light.

Q Very light?

A Yes, sir.

Q I show you a plan marked Appellants' Exhibit "E", and I ask you to tell us what that is?

A Well, this is a plan showing Lot Number 9 and part of Lot Number 10, our property, in the Oakhurst Plan.

Q Was that plan prepared by a registered engineer?

A Yes, sir.

Q Does this plan show the number of cars that can be parked on your church property?

A Yes, sir, right here in the front it shows space set aside for thirteen cars, and in the rear there is at least the same amount of space for parking cars.

Q And on the sides there is additional space?

A Yes, sir.

By Mr. Hahalyak: We offer in evidence Appellants' Exhibit "E".

By Mr. Hahalyak:

Q As I recall, at the last Hearing there was testimony that this Church would be used only three times a week, generally speaking?

A For Church meetings, that is right.

Q And at those times, would traffic be heavy or light on Bethel Church Road?

A Comparatively speaking, it would be light.

Q Would the members of your congregation come to church services by street car and bus, besides automobile?

A That is right.

Q If you are not permitted to build a church at this location, would this property be of any value to you?

A If we cannot build a church on this property, it would be of no value to us.

Q In other words, if you are not permitted to build your church on this property, it would be of no value to your congregation?

A That is right.

Q You have no other churches in the Bethel area?

A You mean The Jehovah's Witnesses?

Q Yes.

A No.

Q Are there other churches in that neighborhood?

A Yes, there are other churches in the neighborhood.

Q If you are permitted to build this church, would it in any way materially change that area?

A No, sir.

Q Do you think it would be conducive to public interest to have a church erected at this location?

A Yes, sir, definitely it would.

Q In your opinion, would it adversely affect the market values of adjoining properties?

A No, sir, I believe in that particular area it might increase values.

Q It certainly would not decrease property values?

A It certainly would not, no, sir.

Q Is that area densely populated or sparsely populated?

A Sparsely populated.

Q I show you three pictures, marked Appellants' Exhibit "D", and I ask you if these pictures

show the location of this property, generally speaking?

A Yes, sir, they show the location of the property.

By Mr. Hahalyak: I offer these pictures in evidence, Appellants' Exhibit "D".

Cross Examination

By Mr. Craig:

Q Now, will you tell us over what period of months, during this year, you looked for a piece of property for a church?

A We became a congregation in May; we looked for a piece of property during May, June and July, and we found our property in July.

Q When did you get a deed to the property?

A The date is on the deed which was presented in evidence last week.

Q Well, do you recall in what month you got the deed to the property?

A I believe it was along in August.

By Mr. Hahalyak: The 13th Day of August, 1954.

By Mr. Craig:

Q Whom did you buy the property from?

A The property was transferred to the trustees from one of our congregation members, Mr. Prentiss Swift.

Q Didn't Mr. Swift get title to this property in May, 1954?

A The deed will tell you that.

By Mr. Hahalyak: June 4, 1954, is when title was conveyed to Mr. Swift.

By Mr. Craig:

Q Mr. Swift is one of your trustees, isn't he?

A Yes, sir.

Q You told us that you looked for property during July?

A Yes, we did.

Q You are telling us that you looked for property during July, at which time one of your own trustees owned this property?

A That is right, because in the month of July it came to our attention there was a building vacant which possibly might be a suitable place for us, and we looked at that particular piece of property.

Q Now, before you took a deed to this property, as trustee of the church, did you examine the requirements of the zoning ordinances?

A No, we did not.

Q Now, you stated that this location would be in the center of the territory of your particular congregation?

A Yes, sir.

Q Will you tell us what the boundaries are of your territory?

A Well, we go down to Conover Road, it runs clear down to Beadling, to Bridgeville, to Donaldson's Crossroads, to Venetia; we by-pass Finleyville; then we come down to the entrance to South Park, then it goes out Route 88, and then comes back.

Q Is it correct to say that the intersection of Routes 51-88 represents one of the northernmost points of your territory?

A I could designate it exactly on the map.

By Mr. McManus: Note for the record

that the witness is now referring to a Gulf Map of Allegheny County.

By Mr. Craig:

Q Looking at this map, tell us whether or not the Intersection of Routes 51-88 represents one of the northernmost points of your territory?

A Yes, that would possibly be the northerly part of our territory.

Q Now, can you tell us what the southernmost point of your territory is?

A Well, over to Bridgeville, down to Mayview, out to Donaldson Crossroads, the southernmost point of our territory, according to this map, would be Donaldson Crossroads, I imagine.

Q You have testified that you presently have forty members. What is the minimum age of a member of your congregation?

A Well, we have one member, Mike Brecht; little Mike is very popular and he is counted as a member.

Q How old is he?

A Seven years of age.

Q You stated that a certain number of cars could be parked on your property. How many square feet, per car, have you allowed?

A 300 square feet per car.

Q Did you figure 300 square feet per car?

A Yes, sir, I believe we did.

Q You mentioned Crest Way. Did I understand you to say that Council has passed an ordinance opening Crest Way?

A I have been led to believe so.

Q At the present time, you cannot drive a car up Crest Way onto your property, can you?

A No, sir.

Q Would your church be willing to pay for the expense of opening, grading and paving Crest Way?

A Well, just like any other owner of property, we would not refuse.

Q Are you telling us that you are willing, as a Church, to bear the expense of opening that alley?

A Our portion of it.

Q I believe you told us that you live on McMurray Road. Where is McMurray Road on which you live?

A The part of McMurray Road on which I live, is in Peters Township.

Q What opportunity have you had to observe traffic at the intersection in question?

A I by-pass that road practically every day.

Q You have never lived at or near that intersection, have you?

A No, there is no house there to live in.

Q How does the topography of your land in question differ from the adjoining lots?

A Practically no difference.

Q At the point where your lot touches the Bethel Church Road, is the shoulder or berm in front of your lot any different than the shoulder or berm in front of the adjoining lots?

A No.

Q Now, if a variance is not granted here, and if you were unable to use this property for a church, the property is saleable, is it not?

A Saleable?

Q Yes.

A I imagine it is.

Q You could sell it to somebody who would buy

it for a home, let us say?

A Possibly.

Q And they would pay you money for it?

A I do not think we are interested in selling it.

Q You have testified that it would have no value if you could not build a church on it. You do admit it would have a resale value?

A Well, we purchased the property for the purpose of building a church there, and we want to build a church on that lot. We have plenty of parking space there; we have a driveway from Bethel Church Road, and our intentions are to build a church there.

Q Assuming that you are not permitted to build a church on it, the property would nevertheless bring you some value by reselling it to somebody else?

A In other words, you mean if we wanted to sell the property, would be [sic] get money for it?

Q That is right.

A Why, sure, we would get money for it, but we bought the property for the purpose of building our church there, and that is what we want to do; we have no intentions of selling the property.

Q Anybody would be willing to pay you money for it?

(Unanswered)

By Mr. Craig: I have no more questions.

By Mr. Hahalyak:

Q You purchased this property for the construction of a church?

A That is right.

Q Would it have any value to your congregation, for any other purpose, other than a re-sale value?

A No, sir.

Q The Church could not use it for any other purpose?

A No.

Q It would have no value to your Church?

A No, sir. We bought the property to build a church on, not to sell it to somebody else.

Q If you cannot build a church upon that property it would have no value as far as church functions are concerned?

A That is right.

Q You say you did not look into the zoning ordinance prior to the purchase of this property. Were you aware of other churches in that community?

A Yes, sir, we were aware of other churches in that community.

Q Were you aware that other churches were within the quarter-mile limits?

A Yes, sir, we were aware of that.

Q And you believed the same situation would exist as far as your church was concerned?

A Yes, sir, we did.

Q And you were led to believe that by observations in the neighborhood?

A That is right.

Q There are other churches within this quarter-mile area?

A Yes, sir, one I have in mind is Saint Thomas Roman Catholic Ch ch, and I believe by speedometer measurement it is within one-tenth of a mile.

Q When was that built?

A This year.

Q And that was known to you prior to the purchase of your property?

A Yes, sir.

By Mr. Plocki:

Q What is your occupation?

A I work as an agent for an insurance company.

Alexander Sansosti, a witness recalled by the Appellants for further redirect examination, testified as follows:

By Mr. Hahalyak:

Q What is your name, sir?

A Alexander Sansosti.

Q What is your occupation?

A Registered Architect.

Q Mr. Sansosti, did you prepare plans for the church in this particular case?

A I did.

Q At the last Hearing, there was some question as to the height of this church from curb level. Can you now tell us what the exact height of this church would be, from the curb level?

A Well, I made a survey last Sunday to verify this very point, and at curb level it varies. You have 11.4 feet rise in elevation from curb to building line.

Q What would be the height of the building from the curb line?

A Well, 14 feet plus 11 feet, approximately.

Q How many feet would you say the height would be from the curb line?

A 25 feet plus a fraction.

Q And would that be within the zoning requirements?

A Yes, sir, it would be.

Q Mr. Sansosti, the plan which you have in your hand, which is Appellants' Exhibit "E", does that show the amount of parking space on this property?

A Yes, sir, it does.

Q How many cars could be placed there, according to this plan?

A 13 cars in the front.

Q And how many cars could be parked in the rear?

A Approximately the same number in the rear.

Q How many cars could be parked on the sides?

A I would say you could park 5 or 6 cars on each side.

Q In your opinion, would this church enhance the value of property in that neighborhood?

A I would say definitely yes.

RECROSS EXAMINATION

BY MR. CRAIG:

Q How much parking space have you figured for each car?

A 8 feet by 18 feet 6 inches.

Q 8 feet by 18 feet 6 inches?

A That is right.

Q How many square feet is that, approximately?

A 148 and a fraction.

BY MR. HAHALYAK:

Q Mr. Sansosti, were you the architect for the construction of The Jehovah's Witnesses Church at Parkman and Bigelow, in the City of Pittsburgh?

A Yes, sir, I was.

Q Are the properties in the vicinity of Parkman and Bigelow, generally speaking, of a much higher residential value than this particular property we have before us?

A Most certainly.

Q Was the Permit granted in that case, without

any objection or protest by anybody?

A Yes, sir.

Q And has that enhanced the property value in the vicinity of Parkman and Bigelow?

A I believe so.

Q Is the neighborhood around Parkman and Bigelow one of the most exclusive neighborhoods in the City of Pittsburgh?

A Absolutely.

Q Are those properties in that vicinity worth $50,000 and upwards?

A Yes, sir.

Q Would they average $75,000?

A I would think so.

Q In the community where this church is to be built, are there any properties in that neighborhood of approximately the value of the properties at Bigelow and Parkman, as a general rule?

A I would say not.

By Mr. Craig:

Q Are you acquainted with any sales of real estate at the corner of Parkman and Bigelow, since The Jehovah's Witnesses Church was erected there?

A No, but I can approximate the value of property; I think I am qualified to do that. However, I am not aware of any property for sale in that neighborhood.

Casimir Stroz, a witness called in behalf of the Appellants, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAHALYAK:

Q What is your name, sir?

A Casimir Stroz.

Q And your address?

A 920 Berkshire Avenue, Pittsburgh.

Q What is your occupation?

A Real estate salesman.

Q How long have you been a real estate salesman?

A Since about August of 1950.

Q Are you familiar with property in the Bethel area?

A I have a very good opinion of the properties in this particular area, by reason of comparative sales and what properties are being sold for.

Q Do you know of sales that have taken place in the Bethel area?

A Yes, sir, for several years.

Q Are you aware of this particular piece of property, owned by The Jehovah's Witnesses that is in question here?

A Yes, I am aware of it.

Q In your opinion, if this church is erected, would that enhance the value of property in that area?

A It definitely would.

Q In your opinion, would the character of that neighborhood be in any way changed by the construction of this church, or would it maintain the same general character?

A It would improve it, it would definitely enhance the value of that property.

Q You are a Jehovah's Witness?

A Yes, I am.

Q Do you think it would be towards the public interest to have this church constructed on this particular piece of property?

A Yes, sir it would be.

CROSS EXAMINATION

BY MR. CRAIG:

Q Will you tell us why the construction of a church there would enhance the values of surrounding properties?

A For two reasons:- I have seen the drawing or sketch of this property; it is a beautiful building, for one thing, and, another reason is that people buying homes like to be near locations where they can attend church easily, and that definitely improves sales values.

Q Do people object to living close to where there are twenty or more cars parked at times?

A I have never received any such objection.

PRENTISS SWIFT, a witness recalled by the Appellants, testified as follows:

BY MR. HAHALYAK:

Q Your name is Prentiss Swift, and you testified at the prior Hearing in this case?

A Yes, sir.

Q Mr. Swift, I do not know whether I asked you this question at the prior Hearing, so I will ask you it again. In what way would the refusal to grant this variance hurt your church?

A Well, it would destroy the uniqueness of our lot, in that our lot is designed and suited at the present time for the construction of our church.

To my mind, to refuse us permission to build our church, would be a hardship on our entire congregation. As stated in previous testimony, we are now cramped and congested in our present quarters; we have need for a church, and to refuse us a permit would necessitate our continuing to use our present quarters, at least temporarily, where we are cramped and congested, and would certainly work a hardship upon our congregation.

Q Do you live near this property?

A Yes, sir, I do.

Q How near?

A Approximately within 300 feet.

Q Do you think the construction of this church will adversely affect your property?

A No, sir, definitely not.

Q In your opinion, will it enhance the value of your property?

A I certainly believe it will.

Q Will it in any way change the residential nature of the community, will it retard it or will it maintain the same characteristics?

A I would say it will improve it.

Q Are there other churches in that community?

A Yes, sir, there are other churches.

Q So that this would be just another church?

A That is right.

Q In your opinion, will this church be for the public interest?

A Yes, sir, it will.

Q In what way?

A In the way that our meetings are conducted in an open manner, to which the public is at all times welcome to attend, to study the scriptures, to listen

to our teachings. The public is always welcome to our meetings.

Q In your opinion, will this church in any way depreciate the value of other property in that neighborhood?

A Definitely not.

Q If this permit is not granted, could your church use this property for any other purpose?

A No, sir, we could not.

Q What would you have to do?

A We would have to dispose of the property.

Q By disposing of it, you mean what?

A Well, we would either have to hold it in its present state and do nothing with it, or we would have to sell the property and reclaim what we can out of it, which would necessitate starting again looking for another desirable location on which to build our congregation a church.

Q Were you on the committee that purchased the property in question?

A Yes, sir, I was.

Q What conclusion did you come to after investigating various pieces of property for purchase?

A That this was the best piece of property available for our church purposes; it was centrally located; it was easily accessible by all means of transportation, with plenty of parking space.

Q Was there any other piece of property in the Borough of Bethel that was equally suitable for your purposes?

A In the opinion of the committee, we decided there was not.

Q Would the construction of this church hurt anybody, in your opinion?

A No, sir.

Q Do you create any noise at your church meetings?

A No, sir, we conduct our meetings in a very orderly manner.

CROSS EXAMINATION

BY MR. CRAIG:

Q The trustees bought this property from you as an individual?

A That is true.

Q If this church should not be built, would you be willing to give them their money back and take the property back?

A Well, I never thought of that; I do not know whether I could give them their money back; I may not have the money to give back to them.

Q Why did you buy this lot, in the first place?

A I saw the lot, I liked the lot, and I purchased the lot on that basis.

Q You purchased it for your own use, did you?

A I was not sure at the time of purchase whether it would be for my own use or not.

Q But when you purchased this property, there was the possibility that this property, purchased by you, would eventually be the site of your church?

A That could be, yes.

BY MR. HAHALYAK:

Q You made no gain on this transaction?

A None whatsoever.

BY MR. WUKESON: Is there anyone here of the Jehovah witnesses that is familiar with the activities of the Jehovah Witnesses at the build-

ing completed on Bigelow Boulevard? If so, I would like to have him take the stand for a few questions I would like to have answered.

BY MR. HAHALYAK: I believe the gentleman on the stand can answer your questions.

BY MR. WUKESON:

Q I inquired of two people, and they told me that every night you have activities at this church out on Bigelow Boulevard, also in the afternoon, and that there are quite a few cars parked on both sides of the street out there, both in the afternoon and at night. What can you tell us about that?

A I believe that two distinct congregations are using that church for their meetings, at different times in the evenings. I know of no organized activity which is carried on out there in the afternoon. However, the building is not locked, and our members and the public can use it for study and reading our publications that we have out there.

Q You mentioned two congregations. What do you mean by that?

A I said that two congregations are at present meeting in that church.

Q Is it true that there are a lot of cars parked there at all times, both during the day and evening?

A Well, I have passed that site many times at Noon, and I have not seen any cars parked about that building. At times on Sundays, I have passed there and I have seen automobiles parked there.

Q Well, do they have activities out there every night?

A No, sir, not to my knowledge.

BY MR. HAHALYAK:

Q What building is across the street from that church?

A Well, Schenley High School is dire tly across the street.

Q Could some of those cars parked around there belong to Schenley High School students?

A I have noticed that quite a few high school students use automobiles going to and from school.

Q Are there any other public buildings nearby this particular area, which might necessitate the parking of cars nearby?

A Well, there is Syria Mosque, but they generally park on their own parking lot. There are also football and baseball games in that vicinity, and the spectators might park their cars in that area.

Q Cars parked in that area might also belong to the faculty or students of the University of Pittsburgh?

A That is right.

Q Also cars parked around there might belong to persons attending the Pittsburgh Athletic Association?

A Yes, sir.

Q In other words, cars parked along there may belong to people going to numerous places in that vicinity?

A That is right.

BY MR. PLOCKI:

Q Those two congregations that you mentioned, they are both congregations of Jehovah witnesses?

A That is right, yes, sir.

Q When did you start holding meetings on Irishtown Road?

A Well, we organized our congregation out there early in 1954.

Q You started with how many members?

A I believe it was thirty-eight members.

CLAUDE O. DAWSON, a witness called in behalf of the Appellants, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAHALYAK:

Q What is your name, sir?

A Claude O. Dawson.

Q Where do you live?

A Clifton-Library Road.

Q Mr. Dawson, without going into details, I want to ask you whether or not you have visited the church property of the Jehovah witnesses located at Parkman Street and Bigelow Boulevard?

A Yes, sir, I have, quite frequently.

Q Have you seen automobiles parked in the driveway of that property?

A Yes, sir.

Q Do you know whose automobiles they were?

A Yes, sir, high school boys. We could not even get in to park our own cars.

APPELLANTS REST

APPELLEES' CASE

MR. C. CLIFFORD KAYLOR, a witness called in behalf of the Appellees, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRAIG:

Q What is your name?

A C. Clifford Kaylor.

Q What is your address?

A 107 Rittenhouse Street, Bethel Borough, Pittsburgh 34.

Q What business are you in, Mr. Kaylor?

A I am a licensed real estate broker.

Q How long have you followed that occupation?

A I have been a licensed broker for twenty years and in the real estate business for thirty-three years.

Q As a broker, you are associated with a real estate firm, are you?

A That is right.

Q What firm is that?

A George A. Jones & Sons, Carson Street, South Side, Pittsburgh.

Q Do you have any other association in the real estate field?

A Yes, sir, I am an officer of Oakhurst Construction Company, contractors and builders.

Q In those activities, have you become familiar with the Oakhurst Plan?

A Very definitely familiar with it.

Q Have you had any dealings with lots in the Oakhurst Plan?

A Back three years ago, we were the successful bidders at the bankruptcy sale of the Reynolds Construction Company; we purchased fifty-seven lots in the Plan, and that included lots on almost every road in the Oakhurst Plan. We sold fifty-one of those

lots. We now own six lots, on which we are building some new homes.

Q Where are those six lots located?

A They are on Bethel Church Road.

Q By reference to this Plan, Objectors' Exhibit No. 1, will you tell us how the lots you own are located in relation to Lots Numbers 9 and 10 in question?

A In relation to Lots Numbers 9 and 10 in question, we own Lot Number 7-A, to the right of them, or to the south, on the south side of Lot Number 10.

Q Do you own any other lots in the immediate vicinity?

A We own Lot Number 12; we own Lot Number 7; we own Lot Number 6, and at the head of the road we own Lot Number 2.

Q On any of the lots in the immediate vicinity of Lot Number 9, have you erected any structures?

A We have erected several structures, one on Lot Number 6, one on Lot Number 7, and we contemplate erection of a house on Lot Number 7-A, which is on the side of the two lots in question.

Q In relation to those structures, what building line have you observed?

A A sixty-foot building line.

Q Have you, either by seeing the plans or hearing testimony, been informed that the proposed church here will have a fifty-foot building line?

A I heard the fifty-foot building line mentioned here this evening. I have not seen any plans or pictures.

Q Would that fifty-foot building line present any inconsistencies with the sixty-foot building line?

By Mr. Hahalyak: Your Honors please, this is objected to.

By Mr. Craig: I will withdraw the question.

By Mr. Craig:

Q At anytime within the past year, did Mr. Swift or any of the trustees of this church approach you as to a possible site for their church?

A No, sir.

Q To your knowledge, did they approach anyone in the George Jones Real Estate Firm?

A Not to my knowledge, no, sir.

Q Tell me whether or not the construction of a church on this Lot Number 9 would, in your expert opinion, increase or decrease, or in any way affect property values in that immediate neighborhood?

A Well, let me answer it this way: The erection of any public building of any sort in a residential section such as this, would detract from the valuations. I say "public buildings", and that would mean any commercial or public meeting hall, retail store, or commercial structure, would detract from property values in a residential community such as this.

By Mr. Hahalyak:

Q Do you consider this commercial?

A I specified, I believe, any public building.

By Mr. Craig:

Q The fact that this is a church is not as important as the fact that it is a public or semi-public building?

A That is my feeling in the matter. I have no objection to a church, I have objection to a public

building of any sort.

Q Why would the erection of a public building detract or affect property values?

A Well, the activities, of course, would detract from the quietness, and, of course, the coming and going of cars and other traffic usually detracts residential values.

Q For example, would you say that the sale value of a residential home very close to the Bethel Presbyterian Church, would be enhanced or depressed by close proximity to the Bethel Presbyterian Church?

A It would be depressed.

Q Would that be for the same reason you just described?

A Yes, sir, for the same reason.

CROSS EXAMINATION

BY MR. HAHALYAK:

Q Mr. Kaylor, what do you think the purpose of this Hearing is that we have here tonight?

A To develop or prove a hardship.

Q The question before this Board of Adjustment is whether a variance should be granted, and the reason for the variance is that one of the zoning ordinances as it now exists requires that a church, a public building or a school, must be more than a quarter of a mile apart from each other. Now, you testified on direct examination that a church in a community such as this depresses property values. Do you really mean that?

A I mean that if a church is in close proximity with residences that it depresses property values.

Q You, as a real estate man, really mean that?

A Yes, sir.

Q What is the purpose of a church?

A It is a place of worship.

Q You really think that a church in a residential district depresses property values?

A I did not limit my testimony to a church.

Q But you put a church on the same level as any public building so far as its effect on property values in the community is concerned?

A Yes, sir.

Q Would you say that this area is densely populated?

A This is exclusively a residential section in the sense that there are no retail stores, no public buildings.

Q There are churches in that neighborhood, are there not?

A There is one church in the neighborhood, yes, sir.

Q And, in your opinion, if that church was not in that neighborhood, property values would be increased?

A Yes, sir.

Q Don't you know, as a real estate man, that people move into a community where they can be in close proximity to a church?

A I am not discussing the propriety of a church, I am telling you that a church in close proximity to residences depresses property values.

Q Can you tell me of any community in the United States where they forbid churches in a residential area?

A We are speaking of property values.

Q Can you tell me of any residential area in the

United States where there is not a church?

A No.

Q How can you draw the conclusion that you do; if you do not know of any residential area where no church exists?

A We are speaking of a church in close proximity to residences as it effects property values. We are not speaking of the propriety of churches. My statement is that the value of homes in close proximity to a church is depressed. Bethel, to my understanding is the largest borough in Allegheny County, and I do not think that the addition of one church would materially affect property values generally in Bethel.

Q Wouldn't the addition of churches perhaps help?

A Perhaps. What I have been trying to tell you is that public buildings in close proximity to homes, depresses values.

Q Why?

A I have given you my reason.

Q Is that the only reason you have?

A I think that is sufficient.

Q Why do public buildings destroy property values?

A It depends upon where they are located.

Q Now it depends upon where they are located?

A I said if they are in close proximity to a residential area.

Q Do you know of any community in the United States, even the most exclusive area, where a church is not permitted?

A No, I do not.

Q This church in question has forty members; let us assume that it has considerable parking facili-

ties on its own parking lot, off-street parking, do you still say that it would depress property values?

A I have given you my opinion and my reason.

Q When you say it would depress property values, you are speaking of residences within close proximity to the church?

A That is right.

Q How close, how many feet from the church?

A Well, within an area of 1,000 feet on either side of the church, and properties in the rear and across the street.

Q In your opinion, it would depress property values within 1,000 feet?

A Yes, sir.

Q Beyond that distance, might it enhance property values?

A It would not harm property values beyond that distance.

Q You stated that within 1,000 feet of a church, property values would be depressed, but that properties beyond 1,000 feet their value would be enhanced?

A No, sir, I did not say that; I said that property values within 1,000 feet would be depressed, and beyond that distance they would not be harmed.

Q Mr. Kaylor, have people ever came to you to buy property, and inquired whether there were churches in the immediate neighborhood?

A Yes, sir.

Q And when you tell them there is not a church in the neighborhood, do they lose interest and tell you, "Well, we want to attend church"?

A Yes, sir, sometimes.

Q Did you ignore that fact completely in giving your testimony here as to property values?

A I said when a church is in close proximity to homes.

Q Do you place a church in the same category as a commercial store?

A It has been my opinion that people do not want to live too close to a public building whether it be a place of worship or a commercial place.

By Mr. Craig:

Q As far as real estate values are concerned, does a church have any different effect on property values than any other public building?

A No, it does not.

Q So that any statement which you have made with respect to public buildings in general, would also apply to churches?

A That is right.

By Mr. Hahalyak:

Q How many years did you say you have been in the real estate business?

A Thirty-three years.

Q In those thirty-three years, have people come to you and said, "Mr. Kaylor, I want a piece of property where a church of my denomination is located nearby"?

A Yes, many times.

By Mr. Craig:

Q You mean that a prospective buyer's interest in a church depends upon his own particular religious persuasion?

A Yes.

By Mr. Hahalyak:

Q Anything good helps property values in a community, isn't that right?

A Well, you could have a good fire, and that would not enhance property values.

Q That is something destructive, but anything constructive concerning health, morals or the welfare of the public generally enhances property values in a community?

A Yes, sir.

Q In your opinion, is a church good for a community?

A Yes, sir, definitely.

By Mr. Plocki: Gentlemen, don't you think we are getting pretty far afield of the issue involved here?

By Mr. Craig: I have no more questions.

I would like to place on the record a formal request of the Objectors, that the Board, if it has not already done so, take a view of the property involved.

James E. Hindes, a witness called in behalf of the Appellees, first having been duly sworn, testified as follows:

By Mr. Craig: All I want this witness to do is to sit down in this ordinary folding chair, and then we will measure the distance that the chair and the occupant occupies, assuming that he is sitting in the usual position that he would occupy, the number of square feet, if he were sitting in the same chair, in a church.

By Mr. McManus: I would also suggest

that you put in the record the man's height and approximate weight.

DIRECT EXAMINATION

BY MR. CRAIG:

Q What is your name?

A James Hindes.

Q And your address?

A 3008 Oakhurst Road, Bethel Borough, Pittsburgh 34.

Q Would you give us your height and weight?

A 5 feet 8 inches tall, 185 pounds.

BY MR. CRAIG: We have now measured the outside distance, from the outside edges, the width occupied by him, and it measures about 2 feet 4½ inches, the width occupied by him when sitting in this chair.

BY MR. CRAIG:

Q I show you Objectors' Exhibit No. 1, and I ask you if you know what that is?

A Yes, sir, this is a revised plan of Oakhurst Plan, a revised map of the Oakhurst Plan.

Q Does that show Lots Numbers 9 and 10, the lots in question?

A Yes, sir, it does.

Q How, will you state to the Board so that it can be in the record, at what point the property line between Lots 9 and 8 on the Oakhurst Plan, touches Bethel Church Road?

A They touch Bethel Church Road at a stationary island in the middle of Bethel Church Road, Fort Couch Road and the Y intersection.

Q Now, where is your home located with reference to the lot in question here?

A I am located approximately 600 or 700 feet from the lot in question here.

By Mr. Wukeson:

Q What is the number of your lot?

A Lot Number 36.

Q Your lot is Number 36, and the Lot in question is Lot Number 9?

A That is right.

By Mr. Craig:

Q Have you had an opportunity to observe the movement of traffic at this intersection of Bethel Church Road and Fort Couch Road?

A Yes, sir, I have.

Q For what period of time have you been acquainted with that intersection?

A Well, just recently I am one of a group of people that have solicited from Bethel Borough Council additional protection, because of the number of accidents there, on account of the heavy traffic on Bethel Church Road.

Q Now, does that intersection at the corner of Bethel Church Road and Fort Couch Road serve as a route for local traffic or thru traffic, or both?

A For both.

Q What percentage, generally, of thru traffic would consist of heavy trucks as opposed to passenger cars?

A I do not think I can answer that percentage-wise. I do know that truck traffic is heavy in the early morning and midmorning, and in the mid-afternoon and early evening. I do know that there is a substantial amount of truck traffic there.

Q Have you observed any partiular kind of trucks which are part of that traffic?

A There are three types, one is the flat-body trucks hauling steel; another is the tank trucks, hauling chemicals and gasoline, and another is the general freight trucks.

Q To your knowledge, has this intersection any connection between any major arterial highways?

A Yes, sir.

Q Between what highways?

A It is used as a connection for Route 19 and Route 88.

Q You refer to United States Route 19?

A United States Route 19 and Route 88, State Highway 88 I believe it is.

Q On what days of the week is traffic at that intersection heaviest, if you have observed?

A Friday night through Sunday night.

Q Do you mean to say that traffic is heavier, generally, on the week ends?

A That is right.

Q Is that equally true in both summer and winter?

A I would say that traffic is heavier during the summer months than during the winter months.

Q How long have you lived near this particular intersection?

A Five and a half years.

Q Are you acquainted with the ownership of property in that particular area?

A Yes, sir, I am.

Q Do you know of any other lots in that immediate vicinity which would have a real estate value equivalent at least to Lots Numbers 9 and 10 of the petitioners?

By Mr. Hahalyak: Objected to as irrelevant.

By Plocki: Objection overruled.

Exception noted and bill sealed. (Seal)

A Yes, sir, I do.

By Mr. Craig:

Q Can you identify such property?

A The property lies approximately 2,000 or 2,400 feet south of the property in question.

Q On what road?

A Bethel Church Road and Logan Road.

Q Do you know the present owner of that property?

A Yes, sir, I do.

Q Will you identify the property?

By Mr. Hahalyak: Objected to. I do not know the purpose of this line of questioning.

By Mr. Craig: I propose to ask the witness simply whether or not he has personal knowledge of the saleability of the property or the possibility of sale of the property.

By Mr. Plocki: Which property?

By Mr. Craig: The property which he is referring to here.

By Mr. Hahalyak: This is another man's property; he is seeking to tell us whether or not another man might sell his property; it is conjectural.

By Mr. Plocki: On the advice of our solicitor, he may answer the question yes or no, if he has personal knowledge of it.

Objection overruled.

Exception noted and bill sealed. (Seal)

By Mr. Craig:

Q Can you identify the property?

A Yes, sir, I can identify it.

Q Who is the reputed owner of that property?

A Mr. Francis S. Schiedel.

Q To your personal knowledge, has this property been on the market recently?

A It is known to be for sale.

Q Is it on the market now?

By Mr. Hahalyak: Objected to, "It is known to be".

By Mr. Plocki:

Q Do you have personal knowledge of this?

A Yes, sir, I do.

By Mr. Craig:

Q Is that property on the market now?

A I do not know whether it is on the market now, but it is known to be for sale.

By Mr. Hahalyak:

Q Did the owner tell you that?

A Yes, sir.

By Mr. Craig:

Q Are you acquainted with the topography of this lot we are discussing?

A Yes, sir, very much.

Q Does it have as steep a grade as Lots Numbers 9 and 10?

A No.

Q Is this property to which you refer located within a quarter of a mile of a church, school or stadium?

A No, it is not.

By Mr. Hahalyak: I do not understand the purpose of this testimony.

By Mr. Craig: This evidence is brought out simply to rebut the testimony of the petitioners that they sought and could not find any other available property.

By Mr. Hahalyak: If that is the sole and only purpose, go ahead.

By Mr. Craig: That is all I have.

Cross Examination

By Mr. Hahalyak:

Q This piece of property you talk about, is it in a different residential area?

A No.

Q You said it was just about as good or better than the piece of property in question?

A That is right.

Q Do you know whether this property is in residential area R-1, R-2 or R-3?

A No, sir.

Q Would you be surprised if I told you that it is in a lower residential area?

A No, I would not be surprised.

Q When was this property put up for sale?

A I cannot answer that question.

Q About when?

A Within the last four months.

Q Do you know when the property in question was bought by the Jehovah Witnesses?

A I understand it was in August.

Q In other words, they purchased the property

in question before this other property was put up for sale?

A No, sir.

Q You say, at the time the Jehovah Witnesses bought the property in question, this other property was up for sale?

A Yes, sir, I believe so.

Q Now, you have stated there is heavy traffic in this area?

A That is right.

Q You spoke of truck traffic?

A Yes.

Q This piece of property you speak of is on the same road, you said about 2,000 feet away?

A That is right.

Q Don't those same trucks go by there?

A Some of them do.

Q When is this traffic the heaviest?

A Over the week-ends.

Q How about Sunday?

A Including Sunday.

Q Those trucks work on Sunday, just the same as on Monday?

A Yes, sir.

Q How many trucks go by there?

A I cannot tell you how many trucks go by there.

Q On this piece of property in question, you feel that it is better not to have a church there, than to have a church there, because of the traffic situation, is that the point you are trying to make?

A That is the point.

Q Do you think the traffic situation there could be improved by the erection of a Slow Sign?

A It might be.

Q Wouldn't a policeman at that intersection have an effect on the speed of traffic there?

A That is right.

Q Don't you think it would be better to use those facilities to control traffic, than to eliminate the existence of a church?

A Yes, sir.

Q When you are in church, isn't it true that you sit next to a person, side by side?

A Yes, I sit in church exactly as I sat here.

Q This congregation consists of forty members. You do not know how much of the space in this church they would occupy, do you?

A No, sir.

JAMES HEGER, a witness called in behalf of the Appellees, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRAIG:

Q State your name, please?

A James Heger.

Q Do you have an occupation related to the activities of the Borough of Bethel?

A I am Building Inspector.

Q How long have you been Building Inspector?

A Since about March of 1949.

Q What is your principal field?

A My principal field is to check on permits certified by the Borough Secretary, and inspect the buildings.

Q What training have you had for that particular work?

A I am a registered civil engineer.

Q How long have you been engaged in civil engineering?

A Since 1916.

Q Are you familiar with the building known as Saint Thomas Roman Catholic Church, referred to here?

A Yes, sir, I inspected it.

Q What is the nature of that building?

A It is an aluminum and steel building.

Q Is it a permanent or a temporary building?

A It is a temporary building.

Q On what property is it located?

A It is located on the property of the Sisters of Saint Joseph.

Q Has that matter ever come before the Board of Adjustment?

A No, sir.

CROSS EXAMINATION

BY MR. HAHALYAK:

Q Now, Mr. Heger, I will read to you Article VII, Section 2 of the Zoning Ordinance, "After the passage of this Ordinance, no building or structure may be built or erected, no existing building or structure may be remodeled or changed in use, or no land may be changed, without first securing a building permit therefor."

A Yes, sir.

Q The Planning Commission in this particular case said that everything was all right, except there was a variance, and, therefore, it had to be submitted to the Board of Adjustment.

By Mr. McManus: Objected to. The record speaks for itself.

By Mr. Hahalyak: All right, I will cover this in my Brief.

Mr. H. F. Brenholts, a witness called in behalf of the Appellees, first having been duly sworn, testified as follows:

Direct Examination

By Mr. Craig:

Q State your name, please?

A H. F. Brenholts.

Q What is your address?

A 3022 Hillcrest Road, Oakhurst Plan, Bethel Borough, Pittsburgh 34.

Q Where is your residence located in relation to the lots here involved, Mr. Brenholts?

A My home is on Lot Number 20, which is directly behind the lots in question.

Q The lots in question being?

A Lots Numbers 9 and 10.

Q Do you own any other lots in the Oakhurst Plan, in addition to the one on which you reside?

A I own several lots in the Oakhurst Plan.

Q Will you number them, briefly?

A Numbers 18, 19, 21, 31, and 50-B.

Q How long have you lived in your present residence?

A Over twenty-two years.

Q What bus service is available in order to reach the intersection of Bethel Church Road and Fort Couch Road?

A The buses that travel on U. S. Route 19, and

the buses that travel on Highland Road, which turn right and go onto Route 88.

Q How close to the petitioners' property, approximately is the nearest bus service?

A Well, I would estimate a mile and a half from the east.

Q That would be the nearest, would it?

A I think so.

Q How close to the Bethel Presbyterian Church do you live?

A About 1,200.

Q During the years you have lived at your present residence, have you observed the traffic situation at the intersection of Bethel Church Road and Fort Couch Road?

A Yes, sir.

Q Is it possible to see that intersection, standing on your property?

A Yes.

Q Is that intersection heavily or lightly traveled?

A Very heavily traveled, and it is increasing all the time.

Q Did you hear Mr. Hindes' testimony with respect to traffic at that intersection?

A Yes, sir, I did.

Q Do you agree with the testimony given by him?

A Yes, sir.

Q If you know, how does this particular intersection figure in the County system of Belt routes?

A It is one of the connecting roads

Q I show you a map published by the Gulf Company, and I ask you if that gives you an accurate picture of the intersection?

A Yes, sir, it does.

BY MR. CRAIG: I offer in evidence Objectors' Exhibit 2.

BY MR. CRAIG:

Q At what days or times of the week is the peak of traffic at that intersection, as you have observed it?

A Well, in the morning hours between 7:00 and 9:30 in the morning; and on week-ends, traffic is very heavy, I would say on Friday, Saturday and Sunday; traffic is particularly heavy there during the spring, summer and fall months, due to it being a connecting road between Routes 19 and 88, and South Park traffic.

Q I show you a photograph marked Objectors' Exhibit 3, and I ask you if you can tell us what photograph shows?

A This is an arial photograph, taken by plane.

Q What is shown on that photograph?

A A view of the area in question.

Q Now, will you tell us whether or not you heard Mr. Hindes' testimony about the island at that intersection, and whether or not you agree with his testimony?

A Yes, sir, I heard it and I agree with it.

Q Do you know which is north and which is south on Bethel Church Road?

A Yes, sir.

Q Tell us how traffic proceeding south on Bethel Church Road goes in relation to the traffic islands?

A It goes between the traffic islands.

Q Tell us how traffic proceeding north on Bethel

Church Road goes in relation to those two islands, at that intersection?

A It goes on the outside one way, one-way traffic north on the inside towards the property line of that nearest island.

Q Is that streteh of road between the property line and the nearest island a one-way road north?

A Yes.

Q Are there any traffic lights at that intersection?

A No.

Q Is there a traffic policeman stationed there?

A No.

Q Are there any Stop Signs there?

A Yes, two.

Q Where?

A One that stops traffic headed south between the islands, and one that stops traffic coming on the Fort Couch Road going south.

Q In other words, traffic going south on Bethel Church Road turning into Fort Couch Road, must stop for a Stop Sign?

A Yes, sir.

Q Is there a Stop Sign located between the two islands?

A Yes, sir, one.

Q Do automobiles stopping at the one Stop Sign stop in the space between the two islands?

A That is right.

Q It has been testified here that the northerly property line between Lots Numbers 9 and 9 [sic], touches this intersection at the island, is that correct?

A Yes.

Q Now, if a driveway came out of Lot Number

9 at that point, would it be entering Bethel Church Road on the one-way portion of Bethel Church Road?

A Yes.

Q One-way, which way?

A Up the hill, north, I would say.

Q Then if an automobile was leaving Lot Number 9 and intending to proceed southward on Bethel Church Road, how would it proceed?

A It would be required to enter the one-way street and go north, and go far enough until it could make a turn-around, and enter the highway at some distant point.

Q Is the intersection of Bethel Church Road and Marshall Road the nearest intersection north of the intersection in question?

A Yes, sir.

Q Is Bethel Church Road between Fort Couch intersection and Marshall Road intersection up-hill or down-hill?

A Up-hill.

Q Did Mr. Swift, one of the trustees of the Church in question, approach you in relation to lots which you own in the Oakhurst Plan?

Q No, sir, other than the one lot I sold Mr. Swift for his own home, which was some years previous.

Q Mr. Brenholts, would you be willing to purchase this property in question, Lots Numbers 9 and 10, from the petitioners?

By Mr. Hahalyak: Objected to as irrelevant.

By Mr. Plocki: He may answer the question.

Objection overruled.

Exception noted and bill sealed. (Seal)

A Yes, sir, at the price they paid for them.

CROSS EXAMINATION

BY MR. HAHALYAK:

Q You say there are no traffic lights, no policeman, no slow sign at that intersection, is that right?

A That is right.

Q If you had a Slow Sign, if you had a policeman, if you had traffic lights, that would help the traffic situation there, wouldn't it?

A Yes, the same as it would help a traffic situation any place.

Q Now, do you believe a variance should be granted to anybody?

BY MR. CRAIG: Objected to.

BY MR. PLOCKI: That is a matter for this Board to decide.

Ojection sustained.

Exception noted and bill sealed. (Seal)

BY MR. HAHALYAK:

Q You heard the former witness, Mr. Hindes testify?

A Yes.

Q You heard his answers?

A Yes.

Q In order to save time, if I were to ask you the same questions that I asked him, would your answers be similar to his?

A Yes and no, I would say "Yes" on the quarter-mile distance from one public building to another, I mean, there should be no variance as to

that. Secondly, as one of the residents of the Borough and having lived in this location for twenty-two years, and watched the growth of the Borough, and watched the traffic congestion develop over a period of years, I question very seriously that that is a proper location for a church.

Q You were living in that community when it was new-born, relatively speaking?

A Yes, sir.

Q Do you think that churches contribute to the social welfare of a community?

A Yes, sir.

Q Do you really think that a church, with forty members would seriously effect the traffic situation at that intersection?

A I stated before that I do not think it is a proper location for a church.

APPELLEES REST

TESTIMONY CLOSED.

SUMMARY OF BOARD OF ADJUSTMENT HEARINGS
NOVEMBER 3, 1954 AND NOVEMBER 9, 1954

THE BOROUGH OF BETHEL
Municipal Building
5092 West Library Avenue
Allegheny County Pittsburgh 34, Pennsylvania

Burgess
James C. Simmons

Council
Robert T. Hurst, President
John Boden
John Chmelynski

Orion W. King
Joseph Lepkowski
Benjamin W. Jones
John G. Hamberg Case #136

MEMBERS PRESENT - MESSRS. PLOCKI, WUKESON AND RAYBURN

APPLICANT - Trustees of Jehovah's Witnesses, Bethel Unit

PREMISES - Lot No. 9 and part of Lot No. 10 Oakhurst Plan Bethel Church Road

SUBJECT - Church (R-1 District)

DATE OF APPEAL - October 26, 1954

DATE OF HEARINGS - November 3, 1954 and November 9, 1954

DATE OF INSPECTION - Saturday, October 30, 1954

DATE OF DECISION - May 18, 1955

APPEARANCES - Michael Hahalyak, attorney representing Appellant
Owen B. McManus, Jr., attorney, representing Board of Adjustment, Borough of Bethel
David W. Craig, attorney, representing Oakhurst Civic Association
See copy of testimony

ACTION OF BOARD - Appeal denied. Two to one vote

CONCLUSION - See "Findings of Fact, Conclusions of Law, Discussion and Order" and "Dissenting Opinion" attached, hereto.

EDW. J. PLOCKI
Edw. J. Plocki, Chairman
N. CHARLES WUKESON
N. Charles Wukeson
FRANK C. RAYBURN
Frank C. Rayburn

FINDINGS OF FACT BY BOARD OF ADJUSTMENT

1. This appeal is taken from the refusal of the Secretary of the Borough of Bethel, the Borough Council of the Borough of Bethel and the Planning Commission of the Borough of Bethel, to grant or to authorize the grant of a building permit for the construction of a church on Lot No. 9 and part of Lot No. 10 in the Oakhurst Plan of Lots, Bethel Borough, Allegheny County, Pennsylvania, under provisions of Borough Ordinance No. 70-11-51, commonly called the Zoning Ordinance of the Borough of Bethel.

2. Said appeal is predicated upon the contention of the appellants that the Borough Ordinance under which the appellants' application was refused, violates the Constitution of the United States and Pennsylvania, and that, even if said Borough Ordinance is valid under the law of the land, a variance should be extended to the appellants under and by virtue of its terms.

3. The proposed building site of the appellants is located at the intersection of Bethel Church Road and Fort Couch Road.

4. Said location is 877 feet from the nearest place of assembly, the Bethel Presbyterian Church.

5. Ordinance No. 70-11-51 provides in Article III, Section 3 (9), "None of the uses listed in item 8 above, (Church, School, Auditorium, Stadium and similar places of assembly) shall be permitted within ½ mile of each other."

6. Appellants' proposed location is within the One Family Residence District (R-1).

7. The effective date of Ordinance No. 70-11-51 is November 19, 1951.

8. Appellants purchased the proposed building site after the enactment of Borough Ordinance No. 70-11-51.

9. The proposed building site provides off-street parking as described in Article III, Section 3 (8), and has available 3900 square feet to devote thereto. This is enough to accommodate thirteen (13) cars, if the provisions of the Ordinance allotting 300 square feet per car is enforced.

10. Appellants propose using the contemplated erection for the accommodation of the present membership, forty persons, and for potential membership of eighty-five persons.

11. The land in question is no different from other land in the area, and presents no unique or unusual feature as to topography or use.

12. The Bethel Church Road and Fort Couch Road intersection is a heavily travelled highway, giving convenient access to State Highway Route 88 and State Highway Route 19, and is much used as a short-cut between those two traffic arteries.

13. The Bethel Church Road at the Fort Couch Road intersection, is divided by three islands, which complicate the traffic flow at such intersection.

CONCLUSIONS OF LAW

1. The proposed use violates Article III, Section 3 (9) of the Zoning Ordinance in that the proposed church is more than 400 feet less than the ¼ mile distance required between places of public assembly.

2. A variance of such Ordinance by the grant the proposed building permit would not be in the ublic interest in that it would emphasize an al-eady acute traffic problem in the area affected.

3. The lot of the appellants is in no way unique r unusual and no special conditions exist, which ould warrant a variance in order to permit the tilization of such lot for purposes other than those rohibited by the Ordinance.

4. Appellant has failed to establish any unnec-ssary hardship, warranting the grant of a variance, ny difficulty existing herein being attributed en-rely to the appellants' desire to utilize the land in manner contrary to the Ordinance, and the pur-ase of the land having been made while the pro-ibited use Ordinance was in existence.

5. The Ordinance numbered 70-11-51 sets up a easonable classification, under the police power ntrusted to the Borough of Bethel by the laws of ne Commonwealth of Pennsylvania, and the re-usal of the borough authorities to grant appellants building permit is entirely proper and consistent ith the purpose and intent of the Zoning Ordinance.

6. The appellants have failed to establish the eed of a variance from the provisions of Ordinance o. 70-11-51 and the refusal of a building permit is roper in the instant case.

DISCUSSION

This matter comes before the Board of Adjust-ent of the Borough of Bethel, under provisions f the Zoning Ordinance No. 70-11-51, which pro-ides in Article IX, Section 4, Sub-section 3 thereof hat the said Board of Adjustment shall have "the

power to authorize upon appeal, in specific cases, such variance from the terms of the Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardships and so that the spirit of the Ordinance shall be observed and substantial justice done." The facts are not complicated, and the issue comparatively narrow.

In November, 1951, the Borough of Bethel enacted Ordinance No. 70-11-51, commonly designated as the Zoning Ordinance, which Ordinance purports to restrict the erection construction, alteration, repair, location and the use of buildings and other structures in the Borough of Bethel. This Ordinance sets forth the district classifications and regulations, provides for uses and exceptions in use of land areas within the Borough, and generally attempts to regulate the erection of buildings and their use within the confines of the Borough of Bethel. In conformity with the provisions of this Ordinance, the applicant, the Trustees of the Bethel Unit of Jehovah's Witnesses, applied to the Secretary of the Borough of Bethel and thereafter, to the Council of the Borough of Bethel and to the Planning Commission of the Borough of Bethel, for the grant of a permit, so that said trustees could erect a church where the members of this religious sect could meet for the purpose of religious worship. The applications for the building permit by the trustees were duly refused, and from the refusal, the present appeal to the Board of Adjustment was taken, as set forth in the first paragraph hereof.

The basis for the refusal to grant the permit was the undenied fact that the land purchased by the

applicant was less than 900 feet from an existing place of assembly in the Borough of Bethel, and at the intersection of the Fort Couch and Bethel Church Roads which intersection is the juncture of two heavily travelled arteries of traffic between Route 19 and Route 88, State Highways in the Commonwealth of Pennsylvania.

The land was purchased by the applicants, following the enactment of the Zoning Ordinance of the Borough of Bethel, and apparently in complete knowledge of the requirements of the Zoning Ordinance, insofar as the distance separating places of public assembly in the Borough of Bethel was concerned. Following the purchase of the land, the applicants entered into some arrangements with an architect, for the purpose of designing a suitable church, and apparently have been able to devise a proposed building, together with such parking space as would not otherwise seriously interfere with the zoning regulations of the Borough of Bethel, where it not for the prime difficulty referred to in the foregoing paragraph, namely, the lack of suitable space between the existing church on Bethel Church Road and the proposed church at the intersection of Fort Couch and Bethel Church Roads.

This reduction in distance amounting to almost 33-1/3 per cent of the minimum requirements set forth in the Ordinance for districts of this type, would present an obstacle under the most favorable circumstances. When it is considered that the proposed erection is at the corner of an admittedly heavily travelled, narrow and congested area, such as the Fort Couch Road and Bethel Church Road intersection, the applicants' hurdle becomes unsur-

mountable. Both by reason of the flow of traffic, and by the cumbersome regulations for traffic control reflected in the islands which appear in the intersection of the two involved highways, the area involved should present as little traffic problems as is possible in the circumstances, and, even without the presence of the Bethel Presbyterian Church, would offer a problem for study by the borough authorities. Certainly, in the present state of the record, in considering the vital traffic problems facing the borough officials at the location involved, it would distinctly not be in the public interest to grant any permit for the erection of a place of public assembly.

We are not here faced with a situation involving the enactment of an Ordinance prohibiting certain uses where the land is owned at the time of the enactment by an aggrieved owner, who proposes that he be excepted from the provisions of the Ordinance in order to obtain an equitable and proper use of his land, and which suggested use is the only logical one for the premises involved. The present case involves land which was bought after the Zoning Ordinance was enacted and which land can be put to all other practical uses, within zone classifications, excluding the place of public assembly, which the applicant desires to erect. In view of this fact, it is inequitable for the applicant to assert that the Ordinance involves an undue hardship for him, or that unique considerations should exert a degree of influence in the case. Here, the applicant bought the land with knowledge of the prohibited use. The land is useful for a number of purposes, and no hardship is involved in denying the applicant the

right to violate the specific and unambiguous provision of the Ordinance requiring that no place of public assembly shall be erected within a distance of less than ¼ mile from an existing place of public assembly. To permit the requested use would create a safety hazard and constitute a traffic peril.

EDW. J. PLOCKI
N. CHARLES WUKESON
Board of Adjustment, Borough of Bethel

ORDER OF BOARD OF ADJUSTMENT

AND NOW, this 18th day of May, 1955, the appeal from the refusal to grant a building permit is dismissed and the request for variance by the trustees is refused.

EDW. J. PLOCKI
N. CHARLES WUKESON
Eo die FRANK C. RAYBURN dissents
Board of Adjustment, Borough of Bethel

DISSENTING OPINION

The matter before the Board of Adjustment is an Appeal by the Trustees of the Jehovah's Witnesses, Bethel Unit, from the refusal of the Secretary of the Council of the Borough of Bethel to grant a building permit for the construction of a church on property which the Appellant owns in

what is now known as the Oakhurst Plan. The zoning ordinance of the Borough of Bethel, Number 70-11-51, Section 3, Sub-section 9 of Article III provides that there shall be no church, school, auditorium, stadium, or other place of assembly within one-quarter (¼) mile of each other. That the proposed church does not meet this requirement is admitted by all of the parties involved in this Appeal. The proposed church complies with the zoning ordinance in all other respects.

There are three points which cause me to believe that this permit should be granted.

1. There is substantial compliance.
2. It is in keeping with the spirit of the ordinance.
3. Practically no other public place in Bethel Borough complies with the terms of this ordinance.

By all the testimony presented to the Board of Adjustment, it has been shown that the Appellants fail to meet the one-quarter (¼) mile requirement by a matter of two hundred (200) to four hundred (400) feet; therefore, the Appellants have substantially complied with the terms of the ordinance and should not be barred on this technicality.

There has been a great deal of discussion and testimony as to the safety problem presented by the location of the proposed church, but in my opinion, this has been greatly exaggerated. It is impossible to construct any public meeting place without some increase in traffic and by necessity an increase in traffic involves certain safety perils.

The purpose of the one-quarter (¼) mile requirement is obviously to minimize traffic and parking problems which are present when there are sev-

eral public meeting places located in close proximity. Does such a problem exist in this case: It is my belief that such a belief would be fallacious. The Bethel Presbyterian Church is approximately one thousand (1000) feet away and provides parking facilities for its members. The appellants likewise have plans to provide for parking the cars of those members on its own property. It would be utterly ridiculous to assume that people going to one church would interfere with the other in any way but by the traffic which is always prevalent around public meeting places.

Practically no other public place in the Borough of Bethel complies with the terms of the ordinance. There have been many public places constructed since the passage of the ordinance and they have never been denied their right to build. It has also been shown on the record that the planning commission of the Borough of Bethel has approved construction of this church at the location, and I feel that this carries a great deal of weight.

Religious worship is always held in a high place in our nation and has been zealously guarded by our Courts. I likewise feel that greater elasticity must be given in cases of the construction of churches. It is with these thoughts in mind that I must take issue with the decision of my colleagues on the Board of Adjustment and file this dissenting opinion.

FRANK C. RAYBURN
Frank C. Rayburn

CERTIORARI TO ZONING BOARD OF ADJUSTMENT

COUNTY OF ALLEGHENY, ss.

THE COMMONWEALTH OF PENNSYLVANIA
TO THE ZONING BOARD OF ADJUSTMENT

GREETING:

We, being willing, to be certified of a certain proceeding between TRUSTEES OF THE CONGREGATION OF JEHOVAH'S WITNESSES, BETHEL UNIT, Plaintiffs and you, BOROUGH OF BETHEL, ZONING BOARD OF ADJUSTMENT, Respondent before you depending, Do COMMAND YOU, within twenty days after service hereof to certify to our COUNTY COURT at Pittsburgh, the entire Record, or certified copies thereof, as before you it now remains, together with this writ; that we may further cause to be done thereupon, that which according to the Laws and Constitution of this Commonwealth ought to be done.

WITNESS the Honorable BENJAMIN LENCHER, President Judge of our said Court, at Pittsburgh, the 24th day of June, in the year of our Lord one thousand nine hundred fifty five.

DAVID B. ROBERTS
Clerk

(Seal)

By M. E. Fagan
M. E. FAGAN
Deputy

SEP 6 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 437

PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit,

Appellants,

vs.

BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation, and HOWARD F. BRENHOLTS,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

HAYDEN C. COVINGTON
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Brooklyn 1, New York

MICHAEL HAHALYAK
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Pittsburgh 22, Pennsylvania

Counsel for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1957

No.

PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Uit,

Appellants,

vs.

BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation, and HOWARD F. BRENHOLTS,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the Superior Court of Pennsylvania dated March 20, 1957, which holds constitutional an ordinance prohibiting the issuance of a permit to appellants to build a church within the Borough of Bethel located within one-quarter mile of any church, school, public building or place of assembly or that does not provide for specified off-street parking. This jurisdictional statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the Superior Court is reported. (*Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 183 Pa. Super. 219, 130 A. 2d 240) It is attached to this statement and marked Appendix A, *infra*, at pages 28 to 35.

JURISDICTION

This case involves an appeal from a decision by the Board of Adjustment of the Borough of Bethel, Pennsylvania, made under a zoning ordinance, denying an application for a permit to build church in the Borough. The judgment of affirmance by the Superior Court of the decree of the Allegheny County Court was made and entered on March 20, 1957. Within 45 days thereafter appellants petitioned the Supreme Court of Pennsylvania for an order allowing appeal to it pursuant to 17-190 Purdons Pa. Stat. § 12-1136. That court on May 28, 1957, denied the petition, whereupon the Superior Court's judgment became final. The notice of appeal to this Court was timely filed in the Superior Court on August 12, 1957. (*American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20-21 (1923)) Jurisdiction of this Court to hear and to decide this appeal is granted by 28 U. S. C. § 1257 (2).—*Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 160 (1954); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

ORDINANCE INVOLVED

Relevant portions of Zoning Ordinance of the Borough of Bethel, No. 70-11-51, read as follows:

> ARTICLE III, DISTRICT CLASSIFICATIONS AND REGULATIONS, SECTION 1, General—In order to designate, regulate and restrict the location of residence, commerce, business, trade and industry and the location of all buildings designed, erected, altered or occupied for

specific uses, the Borough is hereby divided into the following eight (8) Districts hereinafter designated as:

One Family Residential District R-1
One Family Residential District R-2
One Family Residential District R-3
Multiple Family Residential District R-4
Neighborhood - Commercial District C-1.
Commercial District C-2
Manufacturing & Light Industrial District M.L.I.
Public Reservation District P.R.

SECTION 3. One Family Residential District—R-1. Uses-One Family Dwelling; Church; Public or Parochial School (certified by State Board of Education) 1. Farming (5 acres or more). Less than five acres—Garden, Nursery, Horticultural, Greenhouse. (for private use only). 2. Accessory Uses incident to any of the principal uses above listed. . . .

• • •

Areas. Each lot in this District shall comply with the following minimum requirements:

• • •

(8) Off-Street Parking—Church School Auditorium, Stadium and similar places of assembly, one car space (300 sq. ft.) for every 5 seats or fraction thereof.

(9) None of the uses listed in Item 8 above, shall be permitted within ¼ mile of each other.

• • •

ARTICLE IX, BOARD OF ADJUSTMENT, SECTION 1. Creation-Members—A Board of Adjustment is hereby established. The word "Board" when used in this Ordinance shall be construed to mean the Board of Adjustment. The Board will consist of three members to be appointed by the Borough Council. . . .

SECTION 3. Appeals—Appeals to the Board of Adjustment may be taken by any person aggrieved or

by any officer, department board, or bureau of the Borough affected by any decision of the Borough Secretary. Such appeal shall be taken within a reasonable time, as provided by the rules of the Board, by filing with the Borough Secretary, from whom the appeal is taken, and with the Board of Adjustment, a notice of appeal specifying the grounds thereof. The Borough Secretary shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

• • •

SECTION 4. Powers—The Board of Adjustment shall have the following powers: . . . (3) To authorize upon appeal, in specific cases, such variance from the terms of the Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardships and so that the spirit of the Ordinance shall be observed and substantial justice done.

The variations shall apply principally to height and area requirements such as, among others, when topography or other conditions exist which clearly show a hardship would be caused in requiring full compliance with the requirements of the District.

In issuing such exceptions or variations, the Board shall consider whether such acts will tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with the Zoning Ordinance. The Board may as a condition of issuing such an exception or variation, require such safeguards and restrictions as will protect the neighborhood and not prevent or impair the future use of the land in accordance with the Zoning Ordinance.

In exercising the above mentioned powers, such

Board may in conformity with the provisions of this Ordinance, revise or affirm, wholly or partly, or may modify the order requirement, decisions, or determination appealed from and may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the Borough Secretary from whom the appeal is taken.

The other material parts appear in the printed record which accompanies this jurisdictional statement.

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Where appellants applied for a permit to build and use a church in the Borough of Bethel under the above ordinance which was denied because (1) there were other places of assembly within a distance of one-quarter mile from the

property, (2) there was not adequate compliance with the off-street parking requirements of the ordinance, (3) creation of traffic congestion in the area, and (4) protests of residents against the church, do sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, abridge Appellant's right to freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing such rights?

II.

Where the proof showed that permits to build other churches had been granted under the ordinance without compliance with the off-street parking and the one-quarter-mile limitations but, under the same conditions and circumstances, the administrators of the ordinance refused appellants a permit to build a church, are Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, a denial of appellants' constitutional rights of freedom of religion and assembly contrary to the equal protection clause of the Fourteenth Amendment?

III.

Did the Allegheny County Court commit reversible error in denying appellants the right to prove a denial of equal protection of the laws under and by the ordinance in violation of the Fourteenth Amendment to the federal Constitution by granting permits to build churches without requiring compliance with the one-quarter-mile limitation and thus discriminating against the appellants?

STATEMENT OF THE CASE

Proceedings Had and Rulings Made

Appellants filed a petition for appeal from an order of the Bethel Board of Adjustment made under the above

ordinance with the Allegheny County Court. [R. 3-8][1] Appellee, Howard F. Brenholts, intervened in opposition to the appeal as adjoining property owner. [R. 13-14] The trial court allowed the intervention. [R. 14-15] An order of affirmance was made by that court. [R. 29] An opinion was written containing the reasons for the order together with findings of fact and conclusions of law. [R. 20-29] Exceptions thereto were duly filed by appellants. [R. 29-39] The exceptions were dismissed by an order accompanied also by an opinion. [R. 40-45]

Certiorari was applied for and issued from the Superior Court to the Allegheny County Court. [R. 2-3] The case was briefed and argued, resulting in a judgment of affirmance accompanied by an opinion stating reasons. (*Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 183 Pa. Super. 219, 130 A. 2d 240) The judgment of affirmance was entered on March 20, 1957. See Appendix C. Application for an order allowing appeal to the Supreme Court of Pennsylvania was timely made within 45 days pursuant to 17-190 Purdons Pa. Stats. § 12-1136. See Docket Entries of Superior Court, Appendix D, page 37, *infra*. The appeal was denied.

Material Facts[2]

Appellants, owners of the property in question as trustees for the Congregation of Jehovah's Witnesses, Bethel Unit, applied to the Borough of Bethel for a permit to build a church. [R. 51] The plans submitted complied with all building specifications, safety requirements and setback regulations of the borough and state. [R. 51, 145] The application was submitted to the borough and referred to the Planning Commission of the borough that recommended the granting of a variance from the restrictions in the ordi-

[1] Nine copies of the printed Record filed in the Superior Court (marked as Appendix B) accompany this Statement as to Jurisdiction to support all the things said in this statement of the case.

[2] Since the constitutional questions here depend upon the application of the ordinance to the facts it is necessary to state the facts fully.

nance. [R. 146] The council of the borough, however, on October 25, 1954, denied the building permit "not on the basis of a church, but on the basis of non-compliance with the ordinance, on the basis of creating additional traffic hazards and on the basis of petition by residents against it." [R. 52-53, 54]

An appeal was taken by the trustees to the Board of Adjustment. [R. 54-57] A hearing was had on November 3, 1954, at which appellants, the borough and the local property owners were represented. [R. 57-58] Evidence was received and testimony given both for and against granting a variance. [R. 58-136] The matter was finally decided by the board on May 18, 1955. [R. 137] Findings of fact and conclusions of law were made. [R. 138-139] A majority opinion by two board members supporting the denial was filed. [R. 140-144] The third board member filed a dissenting opinion, stating that appellants had complied with the spirit of the zoning ordinance. [R. 144-146] At the hearing before the board the facts hereinafter stated were developed by the evidence.

Appellants purchased property in the Borough of Bethel on which to build a church building. This was to provide a place of assembly for a congregation of Jehovah's Witnesses, then forced to meet underground in cramped basement quarters at the home of one member of the church in Bethel. [R. 59, 79-80] Plans for the public building were approved by the state and municipal authorities. [R. 51, 60-61] The property was located 877 feet from the nearest place of public assembly or building, another church. This was 443 feet under the one-quarter mile limit imposed by the ordinance. [R. 48]

The present membership of the church is 40 members but the average attendance ranges from 25 to 28 persons on two days of the week, with only three persons meeting there the remainder of the week. [R. 64-66, 79] Only thirteen persons attending the meetings travel by car with the remainder coming by bus, streetcar or walking. [R. 63, 64, 67,

68] An architect testified that there was off-street parking room at the sides, rear and front of the building with room for 38 automobiles or enough space to accomodate parking for a congregation the size of 190 persons. [R. 102] The off-street parking space was more than twice the needs of the maximum size of the congregation, assuming the church attendance reaches the maximum capacity of 85 persons. The ordinance requires only parking space for 17 cars to accommodate the maximum number. [R. 102] The membership of the church would never exceed 85 persons. The group would be split up when the congregation reached that number. [R. 64]

The property is located in a sparsely populated area of the borough. Two vacant lots adjoin the property on the sides; Crest Way, a public road, is at the rear and the property fronts on Bethel Church Road. [R. 36, 92, 94] That road is heavily traveled. The property in question is located near its intersection with Fort Couch Road, which also carries heavy traffic. [R. 21, 122, 123, 139] At night, however, the time of the weekday meetings, and when the Sunday afternoon meetings are held, the traffic on both of these heavily traveled roads is light. [R. 65-66] The weekly church services consume a period of only 5½ hours each week. [65-66] Automobile traffic to the church may use the rear parking entrance from Crest Way, a lightly traveled road. [R. 92]

No measures, such as reduction of speed by a "slow" sign, the stationing of a policeman or installing a traffic light at the intersection of Bethel Church Road and Fort Couch, had been taken by the borough. [R. 67, 68, 127-128, 135] The Board of Adjustment, moreover, did not require entrance by Crest Way, which is admittedly a lightly traveled road. One witness for the borough at the hearing admitted that would be better measures for the control of traffic than barring a church at the proposed site. [R. 128]

The proof showed that the proposed church building conformed to the neighborhood and would beautify—rather

than change—the surrounding area. [R. 83-84, 94] An expert testified that it would not depreciate the value of surrounding properties. [R. 84] Other testimony was to the same effect. [R. 67, 102, 104] A real estate developer who attempted to buy appellants' property said, however, that property located within 1000 feet would be depressed. But he added that the church would not "materially" affect the property values. [R. 117, 118] The church services to be conducted at the proposed site would be quiet, orderly, and at reasonable times. [R. 65, 66, 108]

When appellants purchased the property they relied upon the usual and customary enforcement of the ordinance at the time not to impose the one-quarter-mile or off-street-parking requirements so as to deny permits to church sites. [R. 69, 70, 100] The record of the Board of Adjustment proceedings contained a finding of a member of the board that "practically no other public place in the Borough of Bethel complies with the terms of the ordinance" on the two above restrictions. [R. 147] There was other evidence to show that churches of other denominations had been permitted to be built within one-quarter mile of other churches or public buildings and the prohibition of the ordinance was not enforced with respect to such churches.

Since the Allegheny County Court, on the appeal, had the power to receive, *de novo*, additional evidence about the discriminatory enforcement of the ordinance testimony, supplementing that considered by the Board of Adjustment, was offered to prove that appellants' rights had been denied by the administration of the ordinance in an unequal manner, contrary to law. [R. 16-19] Exception to the exclusion of the evidence of discrimination was noted. [R. 19-20]

How Federal Questions Raised and Determined

In the appeal from the refusal by the borough council to the Board of Adjustment in grounds 4 and 9 the appellants charged that the ordinance, as it had been construed and applied by the Borough of Bethel was unreasonable,

arbitrary, capricious and discriminatory and in violation of the First and Fourteenth Amendments to the Constitution of the United States. [R. 56-57] The Board of Adjustment dismissed the appeal. [R. 144]

The petition for appeal to the Allegheny County Court in Paragraph 9 states:

> "Petitioners further aver
>
> "(a) That the Ordinance as applied to petitioners is unconstitutional under the 1st and 14th amendments of the United States Constitution and under the Pennsylvania Constitution;
>
> "(b) That the Ordinance abridges petitioners' rights to freedom of assembly and freedom of worship and is contrary to the cherished due process and equal protection clauses of the United States Constitution;
>
> "(c) That the Ordinance as applied to petitioners does not bear a substantial relationship to the police powers, that is, to the health, safety, morals and general welfare of the community;
>
> "(d) That the Ordinance is not uniform in its application and is arbitrary, unreasonable and discriminatory;
>
> "(e) That the action of the Board of Adjustment in denying the application for a permit was arbitrary, capricious, an abuse of discretion and without basis in fact or law. A few months prior to petitioners' application the Borough of Bethel granted a building permit to a church of larger proportions but having an even more restricted area separation. Petitioners aver that the granting of this permit was highly proper in that it advanced religious worship in the community. However, petitioners aver that the denial of their application under more favorable circumstances, simply because petitioners adhere to the view of a minority religious group, is discriminatory and that such discrimination smacks of prejudice.
>
> "(f) The Ordinance as applied to petitioners is

vague and indefinite and fails to set forth a proper and definite standard for its application."

The Allegheny County Court overruled the petition for appeal, dismissed the appeal and affirmed the decision of the Board of Adjustment, without discussing the constitutional questions in the terms stated by appellants. [R. 29] In its opinion the court said "we will decide the question of constitutionality of both sections." [R. 22] The federal questions above specified were also not expressly mentioned in the findings of fact or conclusions of law. [R. 20-29] They were implicitly overruled in conclusions of law numbers 1 and 2, where the court held that the off-street parking requirement of the ordinance was constitutional and that the one-quarter-mile limitation "is a constitutional exercise of the police power." [R. 28]

Appellants excepted to the findings of fact and conclusions of law, among other things, as follows:

> "7. Appellants except to the Court's conclusion of law No. 1, which is as follows:
>
> "'1. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(8) requiring off-street parking space at places of assembly is a constitutional exercise of the police power.'
>
> "8. Appellants except to the Court's conclusion of law No. 2, which is as follows:
>
> "'2. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(9) requiring a quarter of a mile separation between places of assembly is a constitutional exercise of the police power.'" [R. 31]

Appellants excepted in grounds 38 and 39 because of the refusal of the trial court to conclude, as contended and requested by appellants, that the ordinance, as construed and applied, deprived appellants of freedom of worship and assembly contrary to the First and Fourteenth Amendments to the United States Constitution. [R. 38] The Allegheny

County Court in a supplemental opinion overruled the exceptions and again failed expressly to pass upon the federal constitutional questions in the terms raised by apellants. [R. 40-45][3]

Appellants by exceptions taken in the County Court specifically complained of the denial of each federal constitutional ground raised in this statement before the Superior Court and such appellate court passed upon such grounds stated in the exceptions, discussing them in its opinion. The question of the denial of freedom of assembly and religion contrary to the First and Fourteenth Amendments is discussed in the first 12 paragraphs of the opinion, Appendix A, *infra*, pp. 28-33. The question of discrimination in violation of the equal protection clause is disposed of in paragraphs 13 to 16, *infra*, pp. 33-34. The exceptions and contentions raised on the appeal to the Superior Court that the ordinance violated the federal Constitution [R. 38-39] were overruled by the order and judgment of affirmance, Appendix A, *infra*, at page 35, and Appendix C, *infra*, at page 36. This was sufficient to preserve the federal questions raised on this appeal.—*Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121-123 (1935); *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154 (1902).

Each question under the federal Constitution presented in this statement was specifically raised in question number 1 of the questions presented in the petition for appeal duly and timely filed in the Supreme Court of Pennsylvania. There the appellants stated:

"Is Article III, Section 3 (8) and (9) of the zoning ordinance, as applied to appellants, invalid as an unconstitutional prohibition of freedom of religion, freedom of worship, and freedom of assembly, contrary to the First and Fourteenth Amendments to the United States Constitution and

[3] The refusal and failure of the state courts to expressly mention or discuss the specific grounds of unconstitutionality in the language pleaded by appellants does not bar this Court from considering them as stated by appellants. See *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 206-207 (1914); *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154 (1902); *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121-123 (1935).

to Article I, Section 3 of the Pennsylvania Constitution? See the petition in the transcript of the record on file in the office of the Clerk of this Court.

The petition for appeal was denied, which also constituted an exhaustion of state remedies on the federal questions here presented. See Appendix E, *infra*, p. 38.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

Preliminary Discussion

Article III, Section 3 of the ordinance permits churches in the residential area of the borough. [R. 47] Section 3 (8) of Article III calls for off-street parking area for churches, schools and other places of assembly of 300 square feet for every five seats. [R. 48] It then adds that no permit for a church, school or other place of assembly will be granted unless one-quarter mile away from an existing church, school or other assembly place. [R. 48]

The building plans originally submitted showed a designated parking space for 13 cars to be parked in front of the church. [R. 101-102] The plans showed space for parking 13 cars to the rear of the church. [R. 102] The plans showed space for parking 6 cars on each side. [R. 102] This makes a total of 38 cars that could be parked on the premises. This was on the basis of 148 square feet for each car instead of the 300 square feet called for by the ordinance. But even under the ordinance a total of 19 cars could be parked on the premises. This would accommodate a seating capacity of 95 or 10 above the maximum capacity of the small church of 85 persons.

Undisputed evidence showed a full compliance with Section 3 (8) of the ordinance. [R. 92-93, 102] The finding by the trial court [R. 22-23] concurred in by the Superior Court, that appellants failed to comply with the off-street parking provisions of the ordinance is arbitrary and capricious and wholly unsupported by the record. [R. 92-93, 102] The Board of Adjustment did not contend that appellants

failed to comply with the off-street parking provisions. [R. 22] It denied the permit only because of the one-quarter-mile limitation. [R. 22, 138-144] The board found substantial compliance with the ordinance in finding number 9. [R. 139] Even though appellees erroneously argued that the 300-square-foot provision was not fully complied with, the Board of Adjustment had the power under Article IX, Section 4 of the ordinance [R. 49] and did grant a variance from that requirement by finding adequate parking arrangements. Since no appeal was taken, as required under the law, by any aggrieved party from the granting of the variance on adequate parking facilities, the question of parking was never properly before any of the appellate courts.

Since the trial court and appellate courts have affirmed the denial of the permit on the constitutionality of the off-street parking provision, it must be considered upon this appeal even though it was complied with by appellants.

Discussion of Questions

I.

Where appellants applied for a permit to build and use a church in the Borough of Bethel under the above ordinance which was denied because (1) there were other places of assembly within a distance of one-quarter mile from the property, (2) there was not adequate compliance with the off-street parking requirements of the ordinance, (3) creation of traffic congestion in the area, and (4) protests of residents against the church, do Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, abridge appellants' right to freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing such rights?

There is a direct conflict of decisions between the Pennsylvania courts and the Supreme Court of Indiana on the validity of the off-street parking provisions of the ordinance. The opinion of the Superior Court adopted the

dissenting opinion in *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954). The court below reached a contrary opinion to that of the Indiana Supreme Court, which held the off-street parking requirement unconstitutional. See Appendix A, *infra*, at page 32. This conflict in decisions on this question between the court below and the Supreme Court of Indiana is grounds for noting probable jurisdiction in this case.—*Pennsylvania* ex rel. *Sullivan* v. *Ashe*, 302 U. S. 51, 52 (1937).

While it is no ground for jurisdiction, it is interesting to note that the holding below on failure to comply with the off-street parking provision is in conflict with a case decided by the Supreme Court of Florida where, on similar facts, it was held that there was a substantial compliance. —*State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78 (1950). Compare *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, decided by the Supreme Court of Washington, June 6, 1957, 312 P. 2d 195.

The decision below is out of accord with *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), which hold that ordinances that abridge freedom of religion, as construed and applied, are unconstitutional. Both sections 3 (8) and 3 (9) of Article III are restrictions and burdens upon the exercise of freedom of religion guaranteed by the First and Fourteenth Amendments. (*Board of Zoning Appeals* v. *Decatur Congregation of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); Compare *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, 312 P. 2d 195 (decided by the Supreme Court of Washington, June 6, 1957)) This is a very substantial question that ought to be decided by this Court.

Off-street-parking requirements, when strictly enforced in a thickly populated county (like Allegheny County, Pennsylvania, where the Borough of Bethel is on the outskirts

of Pittsburgh, one of the largest cities of the country), amount to practically an outright prohibition of new churches in a community. In effect it is an exclusion of churches in most cities and towns. The average size city church of the large denominations seats from 300 to 500 people. This means that the average church preparing to build a new edifice in a new location would have to have available between one-half acre and two acres contigious to the church building. The mere stating of this shows how impossible it is to comply with, which shows what an unreasonable burden it is upon freedom of religion.

The usual church is not wealthy enough to operate a city parking lot for its congregants. The average city or town in the United States does not have that much vacant property located in their populated areas that is available for purchase and use as a church parking lot. This exclusion by impossibility of compliance is a prohibition of freedom of religion. It is obviously unconstitutional. (*Jamison* v. *Texas*, 318 U. S. 413 (1943)) A similar enforcement of a zoning law was held void and unconstitutional in *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952).

The one-quarter-mile limit in the ordinance is equally prohibitory and also impossible of being obeyed. So burdensome is it, even in the Borough of Bethel, that the administrators of the law do not enforce compliance with it by all other churches. Read the enlightening dissenting opinion of a member of the Board of Adjustment in this case. [R. 145] The Borough of Bethel is large in area. While it is a large portion of the county it is in a densely populated area, the largest industrial community of this country. With the limits of the municipality being so expansive yet built-up, the area of the borough being as small as it is, it is impossible to have many churches one-quarter mile apart. It means that a monopoly is granted to the first few churches that locate there. But in practical effect it is prohibitory of all others of the more than 261 different religious groups in the United

States. The borough, under this prohibition, cannot possibly accommodate more than ten of all these religions, the remainder being prohibited in the built-up area of the borough.

The implications arising out of the quarter-mile exclusion are more vicious in their nature than those that arise out of the actual prohibition of churches. The quarter-mile exclusion means that any group (church, stadium, school or other place of assembly) may by certain strategic erections, intentionally or unwittingly, prohibit a religious group from ever erecting its church in any selected choice area. The only corrective measure to prevent this result would be for the body administering the zoning ordinance to allocate the building permits to a fair representation of the various religious groups. This allocation of permits to a cross section of denominations would represent police state tactics in their most reprehensible form.

The one-quarter-mile limitation is geographical and applies in any direction regardless of the type of area and is not confined to heavily traveled streets. It does not attempt to regulate the spacing between churches and places of assembly on any street, which is not admitted to be valid. The restriction has only a very remote and speculative relationship to traffic congestion. The relation claimed is unreal and, as applied, turns out to be a mere prohibition of a right guaranteed by the First Amendment. That the quarter-mile limitation can bear no possible relationship to safety, etc., is best illustrated by the fact that under the ordinance a stadium seating one hundred thousand persons would be permitted in the worst conceivable traffic intersectional area so long as the structure is built within the one-quarter-mile limitation, while a small church having a capacity of only forty persons would be prohibited if it should fall a few feet within the quarter-mile area. The quarter-mile limitation, therefore, in no way restricts itself to the evil with which it is said to deal, but rather strikes down with it the right to freedom of worship.

Furthermore, the traffic-congestion argument advanced in support of the ordinance is without any support in the ordinance. Nowhere does the ordinance speak of traffic, and nowhere does the quarter-mile limitation apply only if the traffic is heavy. On the contrary, the quarter-mile limitation is an absolute criterion in itself without accompanying limitations. The traffic congestion argument used by the courts below in support of the constitutionality of the ordinance are legally irrelevant under the terms of the ordinance. They are pure rationalizations to support an insupportable position.

Traffic control has no relation to zoning, according to some courts. Increase in traffic congestion by a permissive use is also said not to be a factor in zoning, which is concerned only with the classification of the use property may be put to. (*City of Syracuse* v. *Bronner*, 133 N. Y. S. 2d 153, 163 (1953 S. Ct.); *Greenburg* v. *City of New Rochelle*, 129 N. Y. S. 2d 691, 696 (1954 S. Ct.); *Property Owners Ass'n of Garden City Estate, Inc.* v. *Board of Zoning Appeals of Incorporated Village of Garden City*, 123 N. Y. S. 2d 716, 718, 2 Misc. 2d 309, 311 (N. Y. S. Ct. 1953); *Huntley Estates, Inc.* v. *Town of Eastchester*, 121 N. Y. S. 2d 504, 508 (S. Ct. 1953)) By force of the same reason the light and indirect relationship of this ordinance to traffic control in the borough is not sufficient to justify the heavy and direct abridgment of freedom of worship guaranteed by the Constitution.

An unanswerable reply to the contention that both provisions of the ordinance have any reasonable relationship to traffic congestion is that there are other more conventional and direct means of controlling traffic than (1) making all churches operate parking lots for their members and (2) restricting the total number of churches in the borough to an unreasonably small number. The answer is simple and apparent. It is in the record. One of the witnesses against appellants admitted that the use of conventional traffic controls, such as a policeman, a "slow" sign or a

stop light would be superior in the control of traffic in the area to the barring of a church on this property. [R. 128] The borough has not taken any of these direct and conventional steps to control traffic. [R. 67, 68, 127-128, 135] Nor did the Board of Adjustment require the reasonable alternative of making the lightly traveled Crest Way in the rear of the property the entrance to the property in lieu of the more heavily traveled Fort Couch and Bethel Church Roads fronting the property. The board was authorized to exercise this alternative under the powers vested in the board under the ordinance (see R. 49). It has chosen the indirect methods of the prohibition and limitation of the number of places of assembly which have no reasonable relationship to traffic control sufficient to overcome the strong provisions of the First Amendment.

The Supreme Court of Florida held that the failure to take these direct and conventional traffic control measures by the City of Tampa compelled the rejection of the argument that a church must strictly and fully comply with the off-street parking ordinance. The court held that a partial compliance was enough to support a mandamus action to compel the issuance of the building permit for a church. —*State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78 (1950).

This brings this Court to a consideration of the basic error in the approach taken by the courts below in disposing of the federal constitutional question here discussed. These courts treated the question as though all that was involved was the due process clause and the protection of property under it. They failed completely to consider and weigh the heavier provisions of the First Amendment against (1) the measures employed in the ordinance, (2) their remote relationship to traffic and (3) their failure to resort to more direct and conventional police traffic control devices or alternative entrances to the property. This omission in the judicial function performed by the courts below, which is compelled by federal constitutional practice, produced the

error here complained of. This erroneous exercise of the judicial function is out of harmony with *Schneider* v. *New Jersey*, 308 U. S. 147, 161-162 (1939). That case prohibits such severe measures taken against fundamental liberty that have only a remote relationship to the evil to be dealt with. It also holds that the constitutional right outweighs such speculative advantages to municipal convenience.

The church building is as necessary to the pulpit preacher in the exercise of freedom of worship for himself and his congregation of listeners as is the religious pamphlet to the street evangelist or the door-to-door missionary. Freedom of religion guarantees the right to use literature as a part of preaching. (*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944).) It also guarantees the right to use a public park as a pulpit. (*Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951)) By force of the same reason the First Amendment guarantees the right to have a privately-owned church pulpit and place of assembly for worship.

Without a place to assemble there cannot be religious worship. Without owning real estate and the right to build or have a church building there can be no place of assembly for worship. The use of real estate and the right to build a church on it are necessary ancillaries to freedom of worship. They cannot be abridged except for reasons that are strong and sufficiently compelling, as in the distribution of religious literature cases. (*Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944); *Kunz* v. *New York*, 340 U. S. 290 (1951); compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), with *Taylor* v. *Mississippi*, 319 U. S. 583 (1943).) No such reasons exist in this case.

The trial court relied upon the presumption of constitutionality. [R. 26] This does not apply in the First Amendment cases where no attack is made against the face of the ordinance but the contention is that it is unconstitutional as applied. (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Busey* v. *District of Columbia*, 128 F. 2d 592, 595-596 (D. C. Cir. 1943)). The rule of denying presumption of constitutionality is also applied in cases involving zoning ordinances. (In re *Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706 (1946); *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 333, 289 P. 2d. 438 (1955); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942)) The burden is upon the municipality in zoning law cases to prove the justification of abridgment of constitutional rights. (*Applestein* v. *Mayor and City Council of Baltimore*, 159 Md. 39, 47, 143 A. 666 (1930); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-249 (1942)) By affirmance the Superior Court also followed the same error in this case as was committed by the trial court.

Both the trial court and the appellate court in this case gave consideration to speculative and remote arguments so as to sustain the ordinance as a traffic measure. [R. 20-28, 40-44] The arguments are also irrelevant since nowhere does the ordinance make traffic congestion a relevant factor in determining the application of the quarter-mile limitation. The quarter-mile limitation is an absolute criterion in itself. See Appendix A, *infra*, at pages 28, 35 for the Superior Court's ruling. This method of consideration of cases involving the First Amendment has been expressly condemned by this Court. In the many cases decided this Court has laid down the principle to be followed which was ignored by the courts below in this case.

Those courts instead applied the rules applicable to commercial uses prohibited by zoning laws under the due process clause of the Fourteenth Amendment insofar as

it relates only to property. They failed to follow the mandate of this Court in cases under the First Amendment and the Fourteenth Amendment in the following cases: *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940); *Martin* v. *City of Struthers*, 319 U. S. 141, 151-152 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573, 575; *Kovacs* v. *Cooper*, 336 U. S. 77, 88 (1949); *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949). See also *Pittsford* v. *City of Los Angeles*, 50 Cal. App. 2d 25, 32, 122 P. 2d 535 (1942); In re *Mares*, 75 Cal. App. 2d 798, 171 P. 2d 762, 806 (1946). Had the courts below followed the rule stated in the above cases, which is applicable in this case, the speculative and remote considerations and justifications not based upon the ordinance and relied upon for sustaining the ordinance would have been rejected.

The departure taken by the court below from the above-stated cases decided by this Court is grounds for taking this case in for decision. Also the approval as valid under the federal Constitution of an ordinance that, under the guise of regulation, in its operation prohibits the exercise of freedom of worship by barring all new churches from the entire borough, is of such broad national interest and of such great public importance that it alone calls for the exercise of this Court's jurisdiction to decide this case.

The case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), appeal dismissed 338 U. S. 805 (1949) (commented upon in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950)) is not in point. The case did not involve an entire municipality, as here, but the ordinance operated upon only a small portion of the city and prohibited churches in only one small residential area of the city. The case here is like *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman*

Catholic Welfare Corp. v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777, 3 U. C. L. A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 23 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; and 3 St. Louis U. L. Jour. 265.

The reasons relied upon to sustain the validity of the enforcement of the ordinance by the courts below have (in other cases almost identical to this one) been rejected. See *Diocese of Rochester* v. *Planning Board of Town of Brighton*, 1 N. Y. 2d 508, 135 N. E. 2d 827 (1956); *Community Synagogue* v. *Bates*, 1 N. Y. 2d 445, 136 N. E. 2d 488 (1956); *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, 312 P. 2d 195 (decided by the Supreme Court of Washington, June 6, 1957); *State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78, 79-80 (1950); *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); *Congregation Committee, Jehovah's Witnesses* v. *City Council*, 287 S. W. 2d 700 (Tex. Civ. App. 1956); *City of Sherman* v. *Simms*, 143 Tex. 115, 183 S. W. 2d 415 (1944); *Village of University Heights* v. *Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (6th Cir. 1927) (cert. denied 275 U. S. 569 (1927)); *Women's Kansas City St. Andrew Soc.* v. *Kansas City*, 58 F. 2d 593 (8th Cir. 1932).[4] These cases are all applicable. They irrefutably establish the substantiality of the question here discussed.

It is submitted that this question is substantial and of sufficiently wide public importance to warrant the noting of jurisdiction and hearing full argument herein to resolve the question.

[4] Compare *Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928), involving a local zoning ordinance held invalid.

II.

Where the proof showed that permits to build other churches had been granted under the ordinance without compliance with the off-street parking and the one-quarter-mile limitations but, under the same conditions and circumstances, the administrators of the ordinance refused appellants a permit to build a church, are Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, a denial of appellants' constitutional rights of freedom of religion and assembly contrary to the equal protection clause of the Fourteenth Amendment?

The Presbyterian Church, which also provides for off-street parking, is located within this one-quarter-mile area. [R. 69] There are other churches in the same neighborhood. [R. 94, 100, 116] The Board of Adjustment found that the appellants' church complied with the ordinance except as to the one-quarter-mile limitation. [R. 138-139] Read also the opinion of the dissenting member of the Board. [R. 145] He stated that there "have been many public places constructed since the passage of the ordinance and they have never been denied their right to build." Before that he said that practically "no other public place in the Borough of Bethel complies with the terms of the ordinance." [R. 146]

Appellants in the trial court, pursuant to proper practice in such *de novo* hearings, offered proof as to the particularity of permits granted to other churches without compliance with the ordinance. [R. 17-19] A full exception was allowed to the order excluding the testimony on the ground that it was not material. [R. 19-20]

The Superior Court affirmed this exclusion in these words: "Evidence of other variances is clearly inadmissible." In the paragraph preceding the above quotation the court approved a quotation "that permitting some persons to violate a zoning regulation does not preclude enforcement against another." See Appendix A, *infra*, page 28.

Here you have it. A clear case of approval of the highest

court of the state in this case of admitted discrimination in the enforcement of the ordinance. This is approved on the sole ground that it is a violation of the law. But granting a permit to another person to use his property in variance to the zoning law is not a violation. It is permitted by Article IX Section 4 (3) of the zoning law itself. [R. 49] Besides using property as a church is guaranteed by the Constitution and allowed by the ordinance. It is entirely wrong to characterize it as a "violation of the law." Two crimes do not make a right. But that is not the situation here.

It is the granting of the special use permit under the "variance" provision in the case of all other churches and denying it in this case that constitutes the violation of the equal protection clause in this case.

The rights of appellants guaranteed by the First and Fourteenth Amendments have been denied contrary to the equal protection clause. (*Fowler* v. *Rhode-Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886)) In point are *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 545, 171 P. 2d 885 (1946); and *People* v. *Amdur*, 123 Cal. App. 2d Supp. 951, 972, 267 P. 2d 445, 460 (1954). Directly on the nose are *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955); and *Underhill* v. *Board of Appeals of Town of Oyster Bay*, 273 App. Div. 788, 75 N. Y. S. 2d 327, 328 (1947) (affirmed 297 N. Y. 937, 80 N. E. 2d 342). Compare *McConkey* v. *City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682 (1942), where the court summed up the case thus: "The probable explanation of this discrimination is that someone, not unfriendly to the Salvation Army, is no friend to Jehovah's Witnesses."

The decisions of the courts below are out of harmony with the above-cited decisions by this Court and are in direct conflict with state court decisions on the same issue of denial of equal protection of the laws. The applicability of such decisions cannot be questioned and they all call for an ex-

ercise of this Court's power of supervision to halt the departure therefrom by the court below. To this end this Court, on this question alone, ought to note jurisdiction, set the case down for argument and resolve the question.

CONCLUSION

For the reasons above stated this Court should conclude that the questions involved are substantial and of wide public importance so as to warrant the noting of jurisdiction, which should be done by this Court. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

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August, 1957.

APPENDIX A

Opinion of Superior Court of Pennsylvania

No. 124

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania	In the Superior Court of Pennsylvania
Appeal of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit	No. 125 April Term, 1956.

Appeal from the Order of the County Court of Allegheny County at No. A867 of 1955

Opinion by Ervin, J. Filed: March 20, 1957

This case is here on a writ of certiorari directed to the Allegheny County Court. That court affirmed a decision of a board of adjustment in which the grant of a variance from the provisions of a borough zoning ordinance was refused.

The R-1 residential district, in which appellant's property is located, expressly permits the following: "Uses—One-family dwelling; Church; Public or Parochial School (certified by State Board of Education). . . ." It provides: "(8) Off-Street Parking—Church, school, auditorium, stadium, and similar places of assembly, one car space (300 sq. ft.) for every 5 seats or fraction thereof.

"(9) None of the uses listed in Item 8 above shall be permitted within ¼ mile of each other."

The Board of Adjustment and the lower court found, on adequate evidence, that the appellants' proposal violates the ¼ mile requirement in that the proposed location is 877 feet from the nearest place of assembly and that it violates the off-street parking requirements in that 17 parking spaces are required under the ordinance and only 13 spaces will be provided.

Our review is as on certiorari in its broadest sense and we examine the record to see whether there is evidence to sustain the court's findings and whether the proceeding is free from a violation of law and any manifest abuse of discretion. This is so whether or not testimony on the issue was taken in the court below. The scope of our inquiry is determined by the breadth of the certiorari issued by this Court and not by the power exercised by the court below. *Landau Advertising Co., Inc. v. Zoning Board of Adjustment*, 387 Pa. 552; 128 A. 2d 559; *Schaub Appeal*, 180 Pa. Superior Ct. 105, 118 A. 2d 292.

The Board of Adjustment and the court below found that appellants' land is located at the intersection of Bethel Church Road and Fort Couch Road, which intersection is heavily traveled and is further complicated by the presence of traffic islands in the intersection; that the erection of appellants' church at this intersection would substantially increase traffic dangers and congestion; that appellants' land is no different from other land in the area and presents no unique or unusual feature peculiar to it as distinguished from other land in the area; that the zoning ordinance was in effect at the time appellants purchased the land here involved. Appellants concede that traffic regulation is a proper exercise of police powers but they argue that these powers may not be exercised against a church.

In *Schaub Appeal*, supra, at page 113, we pointed out that "The Enabling Act also provides: 'Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets, to secure safety from fire panic and other dangers . . . to facilitate

the adequate provision of transportation. . . .' Act of May 4, 1927, P.L. 519, art. XXXIII, § 3303, added 1947, July 10, P.L. 1621, § 93, 53 P.S. § 15211.3." Our Supreme Court, in *McSorley* v. *Fitzgerald et al.*, 359 Pa. 264, 269, 270, 59 A. 2d 142, passed upon the validity of a regulation which protects against the dangers of traffic congestion in the following language: "Those attacking the constitutionality of such a law as that which is here under consideration obviously labor under the mistaken notion that its purpose is merely to cater to the convenience of the owners and operators of motor vehicles; on the contrary its effect may be to interfere with the perhaps greater convenience of parking on the public streets; its real purpose is to promote the larger and more general good of the community by freeing the streets of the impediments and perils arising from dangerous and often intolerable conditions of traffic congestion. And since the Act is concerned with the regulation of the transportation of persons and property along the highways of the municipality, and since the evils it seeks to remedy vitally affect conditions for the transaction of business, the prevention of accidents, the affective operations of fire and police forces, and, in general, the enjoyment of many phases of city life and activities, its justification stems directly from the exercise of the police power, which is the supreme power of government." To the same effect see *Vine* v. *Board of Adjustment of Village of Ridgewood*, 136 N.J.L. 416, 56 A. 2d 122; *O'Brien* v. *City of Chicago*, 347 Ill. App. 45, 105 N.E. 2d 917; McQuillan, Municipal Corporations, Vol. 8, § 25.132; Yokeley, Zoning Law, 2d Ed., § 212.

The zoning ordinance here involved does not prohibit churches from R-1 residential districts. On the contrary, it expressly permits churches in such districts subject to the above mentioned restrictions. A number of cases have been cited by the appellants from other jurisdictions declaring as unreasonable and arbitrary zoning ordinances which expressly prohibit churches from residential districts. If we had such an ordinance in this case we would give great con-

sideration to the question of striking it down as unreasonable and arbitrary. We are here concerned, however, with an ordinance which imposes certain conditions with respect to the site upon which a church may be erected. Our present problem is to determine whether these regulations or conditions bear a rational relation to the public health, safety, morals or general welfare and are not unjustly discriminatory or arbitrary or unreasonable or confiscatory in their application to a particular or specific piece of poperty. *White's Appeal*, 287 Pa. 259, 134 A. 409; *Lord Appeal*, 368 Pa. 121, 125, 126, 81 A. 2d 533.

The grouping of a number of public assembly buildings in a residential district would obviously create additional traffic hazards. The fire protection facilities of single family residential districts are usually designed to handle the fire fighting problems presented by residences with few inhabitants. They are not normally designed to handle buildings occupied by large numbers of people. Street and traffic control facilities of a residential district are not normally prepared to handle the large concentration of people or automobiles which results from public assembly use. It is reasonable to suppose that several public assembly structures located closely together would create an additional threat to the safety of their occupants and the traveling public. Proximity requirements are designed for the purpose of lowering the hazards which can arise from the close grouping of assembly buildings or structures which are exceptional in a residential district. We are of the opinion that there was ample evidence to justify the findings below to the effect that both regulations here involved bear a reasonable relation to the safety of the public. The evidence shows that the intersection, where appellants propose to locate their church building, is on a traffic route connecting two major arterial routes, U. S. 19 and State 88. It also constitutes a connection between the county system of belt routes. Motor vehicle traffic, largely trucks, is heavy, especially on weekends. In addition to passenger cars, large trucks hauling

freight, steel, chemicals and gasoline pass through this intersection. The vehicles leaving appellants' lot would enter the intersection opposite the islands located in its middle. An automobile leaving the lot would enter on that portion of the road which is made by the island into a one-way lane northward; thus, if such an automobile were to proceed southward on Bethel Church Road, it would have to enter the one-way lane northward and go far enough to make a U-turn and then re-enter the highway and come back through the intersection in question. The double island and the three-way intersection at appellants' site and the additional automobiles of appellants' congregation would certainly further complicate and increase the traffic hazard already existing at this point.

Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in *Kurman et al.* v. *Phila. Zoning Board*, 351 Pa. 247, 40 A. 2d 381, determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. *Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 117 N.E. 2d 115, 123. The language used at page 123 is applicable to the present case: "It is quite evident that the members of the appellee could be killed just as dead going to and from church as going to and from a theater or a basketball game. It is a proper exercise of the police power to protect appellee's members from their own negligence as well as from the negligence of the traveling public. There would be just as much logic in holding that the members of appellee when going to church were not required to comply with the traffic regulations as in holding that the appellee is not required to make reasonable provisions for a lessening of the traffic hazards by off-street parking.

"If it was a proper exercise of the police power for the city by its zoning ordinance to require the appellee to comply with the average setback line of the residences, which only has a very remote bearing on traffic hazards, a fortiori it was a reasonable exercise of the police power to require appellee to provide space for 25 cars to park off the streets. The right of appellee to exercise its religious freedom is not violated in either case."

In *American Communication Association v. Douds*, 339 U. S. 382, 397, Chief Justice VINSON states: "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Porterville*, 1949, 338 U. S. 805, 70 S. Ct. 78."

If the validity of the legislation classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388. To the same effect see *Bell Tel. Co. of Pa.'s Appeal*, 138 Pa. Superior Ct. 527, 531, 10 A. 2d 817.

There is not one word in the record to form the slightest basis for the intimation in appellants' oral and written argument that the appellees "do not like Jehovah's Witnesses" or their "religious practices." The appellees do not object to the placing of a church in the residential district on a lot which complies with the conditions of the ordinance. It has not been suggested that the appellants be relegated to a commercial district or another municipality. There is no basis for charging the board with discrimination. Appellants argue that inasmuch as "there are churches in the very

same neighborhood that have been permitted to operate within the quarter-mile area without objection" the denial of this permit constitutes discrimination and deprivation of rights contrary to the equal protection clause of the 14th Amendment.

The only evidence of another church located within ¼ mile of a similar building is the St. Thomas More Roman Catholic Church. The evidence further showed this to be a temporary structure which never came before the board of adjustment. If other public assembly buildings exist contrary to the terms of the ordinance they are, as said by Judge BROWN of the court below, either violations or variances (if not pre-existing non-conforming uses).

"It has been held quite uniformly that permitting some persons to violate a zoning regulation does not preclude enforcement against another. . . . The circumstances in each case might well have been substantially different." *Hasley's Appeal*, 151 Pa. Superior Ct. 192, 193, 194, 30 A. 2d 487; *Valicenti's Appeal*, 298 Pa. 276, 284, 148 A. 308.

Evidence of other variances is clearly inadmissible. *Ventresca v. Exley*, 358 Pa. 98, 102, 56 A. 2d 210.

The appellants will not be subjected to any particular hardship because the evidence shows that they could obtain another location in a residential area on the same road as appellants' property and about 2000 feet therefrom which would not violate the above mentioned conditions. Their argument that a strict enforcement of the restrictions might prohibit appellants from having a church in the borough does not seem to be in accord with the facts as developed by the evidence. The appellants knew or ought to have known of the conditions applicable to their property at and prior to the time of its purchase. In *Catholic Cemeteries Assn. Zoning Case*, 379 Pa. 516, 522, 109 A. 2d 537, it was said: "The assertion of the court below that 'a literal enforcement of the provisions of the ordinance would here result in unnecessary hardship' is substantiated by only two other statements found in its opinion. The court declared 'it would

probably be impossible to find a suitable tract of land within any reasonable distance of built-up areas that would not be in more or less proximity to residential properties', and . . . '[the owners] in the case at bar are being completely deprived of the right to sell—as to the owners—and being completely deprived, as to the corporation, of their right to dedicate, maintain and use at least an equally important use, to wit, a religious use of burial grounds.' Neither of these reasons is sufficient to support the claim of hardship. That it may *probably* be impossible to find another suitable tract is not the necessary hardship envisioned by the Act."

In *Michener Appeal*, 382 Pa. 401, 406, 115 A. 2d 367, Chief Justice STERN said: "The law is well established that a variance may be granted only where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impact of the zoning regulations on the entire district." See also *Schaub Appeal*, supra.

The appellants' lot does not possess any unique or unusual characteristics which would make it unusable for residential use.

We have examined this record and find that there is evidence to sustain the lower court's findings and we can find no violation of law or any manifest abuse of discretion.

Order affirmed.

APPENDIX B

(The printed Record filed in the Superior Court of Pennsylvania accompanies this Statement as to Jurisdiction.)

APPENDIX C

JUDGMENT

IN THE SUPERIOR COURT OF PENNSYLVANIA

Sitting at Pittsburgh

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania Appeal of PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit	No. 125 April Term, 1956.

Appeal from the order of the County Court of Allegheny County at No. A 876 of 1955.

DECISION

March 20, 1957

Order affirmed.

ERVIN, J.

APPENDIX D

Docket Entries

In the Superior Court of Pennsylvania

Sitting at Pittsburgh

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania

Appeal of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit

No. 125 April Term, 1956.

Appeal from the order of the County Court of Allegheny County at No. A 876 of 1955.

March 21, 1956, Appeal and affidavit filed and writ exit, returnable second Monday of November, 1956.

March 27, 1956, Notice of appeal, filed.

November 2, 1956, Record and Testimony, filed.

November 16, 1956, Argued

DECISION

March 20, 1957

Order affirmed.

Ervin, J.

April 1, 1957, REMITTED

April 23, 1957, Petition for allowance of appeal filed at No. 212 A Misc. Dkt.

APPENDIX E

Docket Entries

In the Supreme Court of Pennsylvania

Western District

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania	No. 2121A Miscellaneous Docket

April 23, 1957, Petition of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, for the allowance of an appeal from the judgment of the SUPERIOR Court at No. 125 April Term, 1956, filed.

April 23, 1957, Acceptance of service, filed.

April 29, 1957, Answer filed.

ORDER

May 28, 1957

Petition refused.

Per Curiam

FILED
OCT 3 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 437

PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, Appellants,

v.

BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation and HOWARD F. BRENHOLTS, Appellees.

Appeal from the Superior Court of Pennsylvania

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1957

NO. 437

PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, Appellants,

v.

BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation and HOWARD F. BRENHOLTS, Appellees.

MOTION TO DISMISS APPEAL

Appellee Borough of Bethel, Pennsylvania, and Appellee Howard F. Brenholts, by their counsel, hereby move that this appeal be dismissed, on the following grounds:

1. No substantial federal question is presented.

   [*Corporation of Presiding Bishop v. Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U.S. 805; rehearing denied 338 U.S. 939. Dismissal explained in *American Communications Ass'n. v. Douds*, 339 U.S. 382, 397, 398 (1950).]

2. The judgment rests upon adequate non-federal bases.

3. Questions concerning alleged unconstitutional exercises of administrative and judicial author-

ity under a state zoning variance statute, the validity of which has not been drawn in question, are reviewable only by writ of certiorari. [28 U.S.C. § 1257(3); *Zucht v. King*, 260 U.S. 174, 177 (1922).]

nted herewith is Appellees' Brief in Support of tion to Dismiss Appeal.

Respectfully Submitted,

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Counsel for Appellees

COUNTER-STATEMENT OF QUESTIONS PRESENTED

A. Where a municipal zoning ordinance expressly permits churches to be erected in all one-family and multi-family residence districts but requires that all places of assembly, including churches, if located in one-family residence districts, meet proximity and off-street parking requirements, are such requirements, as applied to a church, contrary to the Fourteenth and First Amendments?

B. Where Appellants' proposed church location in a one-family residence district violates proximity and off-street parking requirements applied by a municipal zoning ordinance to all places of assembly, and Appellants' request for a variance from such requirements is refused by a municipal board of adjustment and state courts, pursuant to an unchallenged state statute, because (1) the proposed site is not unique and does not present "special conditions", and (2) there is no unnecessary hardship, and (3) the use would be contrary to the ordinance purposes in that it would intensify an acute traffic problem, does the refusal of the variance violate the Fourteenth Amendment?

C. Where a state court refuses to admit additional evidence offered by Appellants to show that other structures exist within the municipality contrary to the ordinance requirements, does such an evidence ruling constitute a denial of Fourteenth Amendment rights?

COUNTER-STATEMENT OF THE CASE

The Bethel Borough Zoning Ordinance, in Section 3, Article III (R. 47a), governing the R-1 One-Family Residential Districts, lists the permitted uses as follows:

"Uses:

One-Family dwelling;
Church;
Public or parochial school (certified by State Board of Education) . . ."

The same uses, including churches, are also permitted in all other one-family residence districts* and in all the multi-family residence districts (See Appendix 1, this brief).

In one-family residence districts only, all "places of assembly", including churches, are required to be at least ¼ mile from each other, and are required to have one car-space (300 square feet) of off-street parking area for each five seats of capacity.

The ordinance provisions for all multi-family residence districts permit churches but do not include any proximity or off-street parking requirements for churches in those districts (See Appendix 1, this brief).

Appellants' Jurisdictional Statement admits that their proposed location, in a one-family residential district, violated the proximity requirement in that it was 877 feet from the nearest other place of assembly—443 feet under the ¼ mile minimum (J.S. 8).

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* Sections 4 and 5 of Article III of the ordinance, which govern the R-2 and R-3 One-Family Residential Districts, contain provisions for churches identical to those in Section 3.

The fact that Appellants' proposal violated the off-street parking requirement was conclusively found by the state courts (R. 21a, 22a, J.S. 29) on the basis of competent evidence.

The proposed seating capacity was 85 seats (R. 63a, 139a) and there could be more (R. 76a). Under Article III, § 3 (8) of the zoning ordinance, 85 seats require 17 spaces or a total of 5100 square feet made usable for off-street parking. The board of adjustment found that the proposed site had available only 3900 square feet for off-street parking, enough to accommodate only 13 spaces (R. 139a).

The averment, at p. 15 of the Jurisdictional Statement, that the Bethel Borough Board of Adjustment "did grant a variance" from the off-street parking requirement, is not correct. No variance whatsoever was granted to Appellants by the board of adjustment decision (R. 144a).

As the basis for refusing to grant a variance to Appellants, the board of adjustment and the lower court found that the land in question was no different from other land in the area, presented no unique or unusual feature as to topography or use, and involved no hardship (R. 22a, 139a, 140a).

A detailed statement of the physical situation appears in the opinion of the Pennsylvania Superior Court.

The board of adjustment found that Appellants had purchased their land with full knowledge of the ordinance (R. 143a).

The lower court affirmed, in every respect, the board of adjustment's findings and refusal of a variance.

The Superior Court affirmed the findings and decision of the lower court in every respect.

ARGUMENT

I.

With respect to the validity of the zoning ordinance's proximity and off-street parking requirements for assembly buildings, as applied to Appellant's proposed church location in a one-family residence district, no substantial federal question is presented.

Even a total exclusion of churches from various kinds of residential districts has been held by this court to present no substantial question.

The instant appeal should be dismissed because this Court has clearly held that a similar, but more stringent zoning regulation of churches presented no substantial question. *Corporation of Presiding Bishop v. Porterville, appeal dismissed,* 338 U.S. 805 (1949).

This Court has specifically commented upon its dismissal of the appeal on the *Porterville* case, by stating:

> ". . . We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. Corporation of Presiding Bishop, C.J.C.L.D.S. v. Porterville, 338 U.S. 805, ante, 487, 70 S.Ct. 78 (1949)". (*American Communications Ass'n v. Douds,* 339 U.S. 382, 397, 398 (1949). The above comment by this Court was made in immediate connection with its statement that:
>
> ". . . When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is

> relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity . . ."

The effect of the Bethel ordinance upon the exercise of First Amendment freedoms is demonstrably milder than the effect of the ordinance in the *Porterville* case.

The Porterville ordinance did not merely regulate church properties when located in one-family residential districts, as does the Bethel ordinance here. The Porterville ordinance excluded churches entirely from the one-family residence districts, excluded churches entirely from the two-family residence districts and also excluded churches from the multi-family residence districts. It permitted churches to be located only in so-called "unlimited" residence districts. *Corporation of Presiding Bishop v. Porterville,* 90 Cal. App. 2d 656, 658, 203 P. 2d 823 (1949).

Appellant's Jurisdictional Statement, p. 23, with concern to distinguish the *Porterville* case, states that:

> "That [Porterville] case did not involve an entire municipality, as here, but the ordinance operated upon only a small portion of the city and prohibited churches only in one small residential area of the city."

This statement of Appellants nearly reverses the true situations.

The Porterville ordinance prohibited churches in all single and multiple-family residence districts, excepting only the "unlimited" classification, and thus came much

closer to involving the "entire municipality" than the instant ordinance.

The Bethel ordinance here allows churches in *all* residential districts. It subjects them to the above-described regulations in single-family residence districts only. In the multi-family residence districts, churches are allowed free of the proximity and off-street parking regulations (See Appendix 1, this brief).

The Bethel ordinance does not segregate churches from residences. On the contrary, it reasonably requires that "places of assembly", including churches, in one-family residential districts, be surrounded by residences.

In such residential districts only, the Bethel ordinance requires that assembly buildings be not bunched together and that they provide off-street parking space, because one-family residence districts do not have the protective facilities necessary to cope with a concentration of assembly buildings and the automobile problems which accompany their use.

The Porterville ordinance met the same problem in a more sweeping fashion by totally excluding all churches and other assembly buildings from all one-family and some multi-family residential districts. This Court held that the Porterville ordinance presented no substantial federal question.

The dismissal of the *Porterville* appeal by this Court provides, we submit, a fortiori authority to warrant the dismissal of the instant appeal.

The proximity and parking requirements are reasonable means for the protection of the public welfare.

The Bethel ordinance requirements that assembly buildings in single-family residence districts be separated by one-quarter mile and provided with off-street parking are reasonably directed, under the police power, toward combatting the harms to public health, safety and welfare which may arise in such districts.

A pertinent section of the Pennsylvania Borough Code provides that:

> ". . . Such [zoning] regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses . . ." Pennsylvania Borough Code of May 4, 1927, P.L. 519 § 3303; Purdon's Pa. Stat. Ann. tit. 53 § 48303.

Thus the Pennsylvania legislature has recognized that zoning requirements should be gauged to suit the type of district. Consideration of the protective facilities normally available in single-family residence districts is therefore relevant.

The fact that the Bethel ordinance permits churches to be erected in the multi-family residence districts free of the requirements applicable to the single-family areas provides evidence that the special problems of those single-family areas supply sound reasons for the proximity and parking requirements.

As the Superior Court succinctly pointed out, the fire-prevention, police and traffic facilities of sparsely

populated residential districts are not designed to handle close groups of assembly buildings, each populated by 25 or 50 or 100 or more persons (J.S. 31). (Appellants admit that the district involved here is sparsely populated [J.S. 9].) One obvious example of this point may be found in the fact that fire-company stations and fire plugs are normally spaced farther apart in such single-family residence districts than in other types of areas.

No case overthrowing a proximity requirement has been found. *Vine v. Board of Adjustment of Village of Ridgewood,* 136 N.J.L. 416, 56 A. 2d 122, 124 (1947) states that such a requirement is designed to avoid "traffic hazards in the area where pedestrians converge on the place of assemblage" and also the risk of fire and, in the case of a church, the noises and interruptions which would interfere with worship.

The size of Appellants' own church is not a controlling factor. The dangers would arise from the *interaction* of Appellants' auto and pedestrian activities with the concentration of people and traffic generated by other nearby assembly uses.

Appellants have contended that because the proximity requirement contains no size factor within itself, it could, under closely similar conditions, block a small church and yet allow a 100,000 seat stadium, presumably within the same single-family residence district.

This view ignores the fact that, in the Bethel ordinance, the proximity requirement is coupled with an off-street parking requirement which *is* scaled in accordance with seating capacity. Thus Appellants' imaginary stadium could be erected only upon a tract of land large

enough to provide the necessary off-street parking capacity; it could not be erected at random.*

Therefore, because the off-street parking requirement increases in proportion to the magnitude of the assembly use, it is clear that the zoning ordinance deals more stringently with the massive use than with the small one, and properly so.

In itself, the off-street parking requirement is not only desirable but necessary in the face of our present-day plague of automobiles. The Bethel ordinance space requirement of 300 square feet per auto is eminently reasonable, considering that it must provide for maneuvering, as well as storing, today's large autos.

The reasonableness of requiring one car-space for every five persons in potential attendance is also apparent.

The particular usefulness of the proximity and off-street parking requirements relates, of course, to the prevention of traffic's dangers to life and limb, a goal clearly approved by the Pennsylvania Supreme Court in *McSorley v. Fitzgerald,* 359 Pa. 264, 59 A. 2d 142 (1948), followed by the Superior Court here (J.S. 30).

One portion of the McSorley opinion is particularly appropriate in connection with off-street parking requirements in Bethel, a Pittsburgh suburb. The Pennsylvania Supreme Court said:

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*Appellants have also overlooked the fact that the Bethel provisions for one-family residence districts do not permit a large stadium as such but would permit only the minor sort which would be an accessory to a "Public or Parochial School". Article III, § 3 (R-47a, J.S. 3)

". . . It is unfortunate that many operators of automobiles habitually ignore the fact that highways are intended primarily for travel and not for the storage of vehicles other than by way of transitory stops for loading and unloading. The congestion caused by such misuse of the streets and by the ever-increasing amount of motor vehicle traffic has become a major problem of municipal administration, —a problem particularly acute in a city like Pittsburgh . . ." (359 Pa. at 268, 269)

The ordinance requirements were validly applied to Appellants' proposed church building.

Appellants' contention that the Bethel ordinance proximity and parking requirements cannot be constitutionally applied to their proposed church building amounts, we submit, to an assumption that church buildings, because of their worthy use, are exempt from zoning regulations, even those which are otherwise reasonable on their face.

Appellants' claim for absolute exemption is answered by *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953), with the words:

". . . It is a non-sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary . . ."

Among the decisions of this Court, Appellants seek to support their contention with the religious literature distribution cases.

However, there is a sound distinction between the instant case, which involves regulation only of the purely structural and physical aspects of the practice of religion, and the literature distribution regulations, which tended to prohibit, censor or tax, often at the individual discretion of public officials, the very activity of evangelism itself.

In *Cantwell v. Connecticut,* 310 U.S. 296, 307 (1940), this Court condemned a licensing requirement which rested "in the exercise of a determination by state authority as to what is a religious cause." In *Largent v. Texas,* 318 U.S. 418 (1943), a permit for the distribution of literature was issued only if the mayor deemed it "proper and advisable." *Lovell v. Griffin,* 303 U.S. 444 (1938) and *Schneider v. Irvington,* 308 U.S. 147 (1939) involved similar censorship powers.

Such unbridled powers are in sharp contrast to the ordinance proximity and parking requirements in the instant case, the application of which depend literally upon the use of a yardstick.

In the instant case there is no attempt to regulate in any fashion the conduct of worship or the pursuit of evangelism.

In this respect, the instant case differs sharply from cases like *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Follett v. Town of McCormick,* 321 U.S. 573 (1944); *Jamison v Texas,* 318 U.S. 413 (1943), and *Martin v. City of Struthers,* 319 U.S. 141 (1943), which laid a tax or an absolute prohibition upon the very activity of religious evangelism.

The zoning ordinance provisions here touch only the physical location of the church structure and the

physical provision which needs to be made for the automobiles of the worshippers.

As to the physical factors of church location, the California court in the *Porterville* case pointed out:

> ". . . It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings. There necessarily is an appreciable amount of noise connected with the conduct of church and 'youth activities.'" *Corporation of Presiding Bishop v. Porterville,* 90 Cal. App. 2d 656, 659, 203 P. 2d 823 (1949).

The Pennsylvania Superior Court in the instant case agreed that it is quite evident that the members of a church "could be killed just as dead going to and from church as going to and from a theater or a basketball game." (J.S. 32)

The same court pointed out the facts which show that the particular intersection at which Appellants here resolved to locate provided a specific illustration of the practical traffic problems which would be intensified by the addition of Appellants' use to the existing problem (J.S. 31, 32). These facts most strikingly underscored the special appropriateness of the off-street parking requirement in this particular location.

Appellants' citations, at p. 22 of the Jurisdictional Statement, also fail to support the view that there is no presumption of validity where a religious use is involved.

United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), actually states, at the very page cited by Appellants, that "the existence of facts supporting the legislative judgment is to be presumed." The footnote on the same page does not discard the presumption.

Thomas v. Collins, 323 U.S. 516, 531 (1945) is a First Amendment case that actually states, at the very page cited by Appellants, that "judgment in the first instance is for the legislative body" subject to judicial review of constitutionality, of course.

Therefore, no cases have been found which contradict the presumption of validity in favor of legislation. As to zoning ordinances, the rule remains that "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

Thus, for example, the determination of whether the feasible separation of assembly uses should be ⅛ mile or ¼ mile is a matter properly left to the discretion of the legislative body.

Appellants' contention of exclusion by impossibility of compliance finds no support in the record. Appellants made no attempt to show that other assembly buildings were so scattered across the municipality as to prevent Appellants from finding a suitable site, because no such fact could be shown.

Appellants admit that one area of the Borough of Bethel is large (J.S. 17). Appellants' assertion that it is "built-up" is contradicted by their own admission that the district involved here is sparsely populated (J.S. 9).

A possible alternative location, away from other assembly uses, was pointed out (R. 123a-126a), and recognized by the Superior Court (J.S. 34).

Furthermore, in the multi-family residence district, Appellants were free to find a location without the necessity for observing any separation from other assembly buildings (Appendix 1, this brief).

The ordinance requirements were properly applied to Appellants, not because appellants proposed a religious use, but because their proposed use involved a "place of assembly" and the problems which accompany such a structure.

The violation of the proximity and parking requirements by Appellants' proposal is clear.

Violation of the proximity requirement by Appellants' proposal is admitted (J.S. 8).

Under the off-street parking requirements in Article III, § 3 (8) of the ordinance, at least 17 car-spaces, of 300 square feet each, were required for Appellants' 85 seat capacity. By reference to Appellants' own plot plan (Appellants' Exhibit B), which showed a maximum of 3900 square feet available in the rear of the proposed building, the board of adjustment, which was familiar with the property, found that only 13 spaces would be available (R. 139a).

Appellants' higher figures have been derived from their unreasonable inclusion of side and front-yard areas (R. 93a) necessary for use as driveways, as well as from the fact that their architect-witness used a car-space factor of 148 square feet (R. 102a), not the

300 square feet factor required in order to provide manuevering space.

The courts approved and adopted, as supported by the evidence, the findings of the board with respect to Appellants' violation of both the proximity and off-street parking requirements (R. 21a, 22a, J.S. 29).

Therefore, we submit that:

1. The ordinance requirements were valid on their face.
2. The ordinance requirements were validly appplicable to Appellants.
3. Appellants' proposal clearly violated those requirements.

Hence, the only real issue in the case was whether or not the situation and circumstances of Appellants' property entitled them to a variance under state law.

II.

The administrative refusal to grant a zoning variance and the judicial refusal to admit evidence of "other variances" do not involve the validity of any state statute and are therefore reviewable only by writ of certiorari.

Because Appellants' proposal could not meet the requirements of the ordinance, it was necessary for them to request that the board of adjustment grant a variance from those requirements. The power of the board of adjustment to grant a variance is governed by the following statutory provision:

". . . The board of adjustment shall have the following powers: . . .

(3) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done . . ." (Pennsylvania Borough Code of May 4, 1927, P.L. 519 § 3307; Purdon's Pa. Stat. Ann. tit. 53 § 48307).

It is important to note that Appellants have not "drawn in question" the validity of this statutory provision nor the validity of its application to their situation.

Thus Appellants' claim of discrimination in the refusal of a variance is directed only toward an alleged unconstitutional exercise of authority under this unchallenged statute and is therefore cognizable only by way of certiorari, rather than appeal. *Zucht v. King*, 260 U.S. 174, 177 (1922).

Similarly, Appellants' complaint against the state courts' refusal to permit the introduction of evidence of "other variances" does not involve the validity of any statute. It too is a claim of "right . . . specially set up . . . under the Constitution," reviewable only by certiorari. 28 U.S.C. §1257 (3).

III.

Because the refusal to grant a variance to Appellants was based upon the fact that Appellants' land did not meet the criteria of the variance statute, the judgment rests upon an adequate non-federal basis and no substantial federal question is presented as to discriminatory administration.

The statutory variance provision quoted above, which allows a variance only where "owing to special conditions" full enforcement would work an "unnecessary hardship", has frequently been construed by the Pennsylvania Supreme Court.

The Superior Court here followed *Michener Appeal,* 382 Pa. 401, 406, 407; 115 A. 2d 367 (1955), which explained that the variance statute means that "a variance may be granted only where a property is subjected to a hardship unique or peculiar to itself," that "the plight of the owners" must be "due to unique circumstances" and that "the circumstances affecting the land . . . must be unique."

This construction of the variance statute by the highest court of the state is controlling. *Georgia Ry. & Electric Co. v. Decatur,* 295 U.S. 165, 170 (1935).

In the instant case, it was clear that Appellants' lot did not possess any unique aspects. The fact that there was nothing unusual, unique or special about Appellants' lot is unmistakably set forth in the testimony of Appellants' own witnesses (R. 71a, 72a, 84a, 85a, 98a).

Upon this strong basis—Appellants' own evidence—the board of adjustment found as a matter of fact (R. 139a) that the lot is no different from other land in the area and is not unique.

Appellants also failed to show any hardship connected with the land in question, which can always be used, or sold, for a non-assembly use in full compliance with the ordinance.

Moreover, the actual traffic problems confronting Appellants' proposed location, at an intersection, were such that a variance would have been at cross-purposes with the safety-protection intent of the ordinance. The Superior Court opinion describes these actual traffic factors in concise detail. (J.S. 31, 32)

For these reasons, the Pennsylvania courts properly held that Appellants' situation, standing on its own feet, simply did not meet the prerequisites for exemption by way of variance. These reasons related solely to the physical nature of Appellants' property. Appellants' religious practices or beliefs had nothing to do with the refusal of the variance.

Having failed to meet the variance requirements, which Appellants have not questioned, Appellants have no standing to claim discrimination.

Although Appellants have contended that "the usual and customary enforcement of the ordinance" was not to impose the proximity or off-street parking requirements upon church sites, the sole "example" which Appellants were able to supply in that connection was their reference to the St. Thomas More Catholic Church (R. 69a, 100a). That church, however, was

shown to be a temporary structure, which had never come before the board of adjustment in any respect (R. 129a).

Moreover, even if a variance had been granted to another church, the propriety of such a variance would have depended upon the particular facts and circumstances relating to the land of such other church. Such a variance would have provided no parallel or precedent relevant to Appellants' property.

The board of adjustment and the courts had no power to grant Appellants a variance because Appellants' land simply did not qualify for one, under the statute set forth above.

Because the statutory rules governing a variance have not been questioned, we submit that Appellants cannot insist that exemption should have been granted to them in violation of those statutory rules.

IV.

The refusal of the state courts to admit additional evidence, offered by Appellants to show the existence of other structures not in compliance with the ordinance, rests upon an adequate non-federal basis.

The propriety of the state courts' refusal to permit Appellants to introduce additional evidence on appeal from the board of adjustment is supported by Pennsylvania adjective law.

On appeal from a decision of a board of adjustment, the entertainment of additional evidence is a matter within the discretion of the lower court. The Pennsylvania Borough Code provides that:

". . . If upon the hearing of the appeal it shall appear to the court that testimony is necessary for the proper disposition of the appeal, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court, with his findings of facts and conclusions of law. . . ." (Pennsylvania Borough Code of May 4, 1927, P.L. 519 § 3307; Purdon's Pa. Stat. Ann. tit. 53 §48307)

This discretionary power of the lower court to hear or reject additional evidence is founded upon the fact that the board of adjustment exists to serve as a quasi-judicial hearing agency. Before the board, Appellants had their full day in court, with witnesses sworn, a verbatim transcript, cross examination and virtually unlimited opportunity to introduce evidence pertinent to the claims of discrimination which they had lodged in their appeal to that very board (R. 56a, 57a). Appellants used that opportunity to present evidence of the sole "exception" they could name, the temporary St. Thomas More Church.

Moreover, even if Appellants were entitled to a second day in court, the fact that the statutory variance depends upon the special characteristics of each piece of land means that evidence of other structures not in compliance with the ordinance would be irrelevant as applied to Appellants' land.

Since Appellants' own situation did not meet the variance statute requirement concerning a unique hardship, the existence of other variances could not show

discrimination without further proof that they each had been granted upon an insufficient basis.

Such collateral, ex parte relitigation of other cases, concerning other persons' properties, would be futile, whether undertaken to show Appellants' own entitlement to a variance or to show discrimination.

Because no parcel of real estate is exactly, or even substantially, the same as any other parcel of real estate, it is apparent that, even if variances had been granted for other properties, they could supply no parallel or common denominator with which Appellants' claim of discrimination could be measured.

For these reasons, the Pennsylvania courts have properly adhered to the rule of evidence that proof of other variances is inadmissable *Ventresca v. Exley*, 358 Pa. 98, 102, 56 A. 2d 210 (1948).

CONCLUSION

We submit that this appeal should be dismissed for want of substantiality.

Respectfully submitted

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APPENDIX 1

Zoning Ordinance of Borough of Bethel, No. 70-11-51:

"Article III . . . .

Section 6. *Multiple Family Residential District — R-4*

Uses. All uses permitted in R-1 District except Accessory Use (No. 2); plus, when public water and sewer service is provided, the following:

Group Houses

Garden Apartments

Areas. Lot lines shall be required in this District and the building or structures placed thereon shall comply with the following minimum requirements:

(1) *Lot Area per Family* — 3,000 square feet for each family dwelling unit provided within the building unit of multiple family use; 10,890 square feet for each one family dwelling or house.

(2) *Front Yard*—35 feet from the established right-of-way lines of the thorofare or street.

(3) *Side Yard*—50 feet on each side; when the rear of the building backs upon the side yard, 35 feet shall be provided.

(4) *Rear Yard*—35 feet from the rear of the main building to the accessory building or if no accessory building is built, the required depth shall be measured to the rear lot line.

(5) *Site Size* — one acre for Group Housing; two acres for Garden Apartments.

(6) *Off-Street Parking* — one car space of 300 square feet shall be provided for each dwelling unit included in the building.

(7) *Maximum Lot Coverage by Building*—25% total.

Height. The height of buildings and structures in this District shall not exceed 70 feet and contain more than six stories."